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IN THE

Supreme Court of the United States

October Term, 1963

No. 987

PRADO OIL AND GAS COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
PUBLIC SERVICE COMMISSION OF
THE STATE OF NEW YORK,
UNITED GAS IMPROVEMENT COMPANY,
LONG ISLAND LIGHTING COMPANY
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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April 7, 1964

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PUBLIC SERVICE COMMISSION OF
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UNITED GAS IMPROVEMENT COMPANY,
LONG ISLAND LIGHTING COMPANY

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioner, PRADO OIL AND GAS COMPANY, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled cause on January 23, 1964.[1]

[1] Petitioner Prado Oil and Gas Company filed a petition for review of Opinion Nos. 362 and 362-A, naming the Federal Power Commission as respondent, which was assigned No. 17859 in the Court of Appeals for the District of Columbia. A companion appeal filed by Continental Oil Company et al was assigned No. 17627 by the court. Petitions for review of the same orders of the Commission were filed by United Gas Improvement Company and Long Island Lighting Company in No. 17628 and by the Public Service Commission of the State of New York in No. 17582. Petitioner Prado Oil and Gas Company intervened in No. 17628 and No. 17582. All appeals were consolidated for hearing and a single opinion affirming No. 17627 and No. 17859 and remanding No. 17852 and No. 17628 was issued by the Court of Appeals on January 23, 1964.

CITATION TO OPINIONS BELOW

The opinion and judgment of the Court of Appeals for the District of Columbia Circuit is not yet reported but is printed as Appendix B hereto, *infra*, pp. 18-34.

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1964. Jurisdiction of this Court is invoked under 28 USC, § 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission has authority under Section 7(e) of the Natural Gas Act to require producers to refund amounts previously collected pursuant to unconditional temporary certificates.
2. Whether, in certificate proceedings under Section 7 of the Natural Gas Act, the Federal Power Commission may refuse to consider probative cost and financial evidence adduced by producers in support of their initial contract prices.

STATUTES INVOLVED

This case involves primarily § 7(c) and § 7(e) of the Natural Gas Act, 15 U.S.C., § 717f(c) and 717f(e) and Section 157.28 of the Regulations of the Federal Power Commission 18 CFR § 157.28. Those sections of the Act and Regulations are set out in Appendix A, *infra*, pp. 15-17.

STATEMENT

Pursuant to Section 7(c) of the Natural Gas Act and the regulations promulgated thereunder,[2] the Federal Power Commission issued *temporary* certificates to Peti-

[2] Section 157.28 of the Regulations of the Federal Power Commission, which is set forth in Appendix A, *infra*, pp. 16-17.

tioner on August 17, 1960 to make sales of natural gas from fields in South Texas for ultimate consumption in the northeastern United States (R. 64).[3] The Commission did not exercise its authority under Section 7(e) of the Act to condition these temporary certificates on a reduction in the 16¢ per Mcf initial contract price. Nor did the Commission attach a refund condition as was its established practice in cases where there was a substantial question of whether the price authorized under the temporary certificate was consistent with the public interest.

Before Petitioner commenced deliveries of gas, the Commission for the first time enunciated "policies which must be followed in order to regulate the rates of independent producers of natural gas in a sane, sensible and effective manner."[4] The Commission initiated area pricing by its *Statement of General Policy No. 61-1*, issued September 28, 1960,[5] and established an 18¢ per Mcf area price for initial sales from Texas Railroad Commission District No. 4 — the area from which Petitioner's sales are made. In reliance on such area price and the unconditional temporary certificates issued by the Commission,[6] Petitioner had little hesitancy in commencing deliveries at the 16¢ per Mcf initial price set forth in its contracts on file with the Commission as rate schedules.[7]

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[3] Record citations are to the pages of the Joint Appendix used in the Court of Appeals, copies of which are concurrently filed with this petition.

[4] Phillips Petroleum Company, 24 F.P.C. 537, 542 (1960), *aff'd sub nom. Wisconsin* v. *F.P.C.*, 373 U.S. 294 (1963).

[5] 24 F.P.C. 818, 18 CFR 2.56, 25 Fed. Reg. 9578.

[6] The validity of these temporary certificates without price or refund conditions was never challenged or appealed.

[7] Section 157.28(c)(2) of the Commission's Regulations (Appendix A, *infra*, p. 17) required Petitioner to file its contracts "as the rate schedule intended to be effective" for the sale of gas under the temporary certificates.

Petitioner's applications for *permanent* certificates were subsequently consolidated for hearing with similar applications filed by other producers making interstate sales of natural gas from fields in the area. Hearings were held before a Presiding Examiner of the Commission, who issued a decision on January 25, 1962 (R. 539-574). The Examiner granted unconditional permanent certificates of public convenience and necessity to Petitioner and the other producers and approved their initial contract prices. Various parties appealed the Examiner's decision to the Commission.

In the orders under review,[8] the Commission issued *permanent* certificates of public convenience and necessity to Petitioner conditioned upon a reduction in its 16¢ initial contract price to 15¢ per Mcf.[9] The Commission's price condition was based solely upon selected prices being paid to other producers in the area (R. 604-610). The Commission expressly declined to consider the cost and other financial evidence offered by Petitioner and other producers in support of their initial contract prices (R. 610).

The Commission did not, however, condition the permanent certificates to require Petitioner and the other producers to refund amounts previously collected in excess of 15¢ per Mcf for deliveries of gas pursuant to their unconditional temporary certificates and filed rate schedules (R. 614).

Petitioner and other producers sought review in the Court below of the price condition imposed by the Commission. Various intervenors appealed the failure of the Commission to condition the permanent certificates to re-

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[8] Opinion No. 362 issued August 30, 1962 (R. 594-639) and Opinion No. 362-A issued December 18, 1962 (R. 708-721).

[9] The Commission simultaneously issued the Fifth Amendment to its *Statement of General Policy No. 61-1*, 27 Fed. Reg. 8918, reducing the area price for initial sales in Texas Railroad Commission District No. 4 from 18¢ to 16¢ per Mcf.

quire refunds of amounts previously collected in excess of the 15¢ per Mcf price condition.

The Court of Appeals held that under this Court's decision in the *CATCO* case[10] the Commission was justified in conditioning the permanent certificates on a 15¢ price predicated solely on certain prices being paid in the area and in disregarding the cost and financial evidence of record. The court further held that the Commission has the statutory power under Section 7(e) of the Natural Gas Act to condition the permanent certificates to require the producers to refund all amounts previously collected under their effective filed rate schedules and unconditional temporary certificates in excess of the 15¢ price condition imposed. Since the court held that this power to require refunds is not mandatory, it remanded the case to the Commission to reconsider the question of refunds in light of the equities involved.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in conflict with the decision of the Tenth Circuit in *Sunray Mid-Continent Oil Co.* v. *FPC*, 270 F. 2d 404 (Appendix C, *infra*, pp. 35-44). This conflict was recognized by Judge Fahy when he stated (Appendix B, *infra*, p. 32):

> "The producers rely upon the Tenth Circuit's decision in *Sunray Mid-Continent Oil Co.* v. *FPC*, 270 F. 2d 404 (1959). The Court there held that even in attaching a refund condition to a temporary certificate the Commission must limit it by setting a price at or below which the producer can sell without risk of a subsequent refund order. The Court felt that without such a limit on the refund obligation the Commission's grant of temporary authority was too vague to allow the producer to decide intelligently whether to accept the

[10] *Atlantic Ref. Co.* v. *Public Serv. Comm'n*, 360 U.S. 378 (1959).

Commission's conditional grant and thereby commit its gas reserves to interstate commerce.

"*To the extent that our decision may be inconsistent with Sunray, we are constrained respectfully to disagree with the latter.* Moreover, it should also be pointed out that as a practical matter the producers in this case were relatively assured of being able to sell their gas without risk of subsequent refund at a price of 14.6 cents per Mcf., the price which PSC and the other consumer interests originally urged as the proper in-line price." (Emphasis supplied.)

In *Sunray*, the court was confronted with a temporary certificate which contained an express refund condition obligating the producer to refund the difference between the initial contract price and whatever price the Commission ultimately found to be required by the public convenience and necessity when permanent certificates were issued. In holding that such an express refund condition was unlawful because it did not apprise the producer of the terms and conditions applicable to the sales under its temporary certificate, the Tenth Circuit stated (Appendix C, *infra*, pp. 42-44):

"The Act contemplates that the Commission need not accept the conditions contained in an application, Sunray Mid-Continent Oil Co. v. FPC, supra; it likewise contemplates that the applicant need not accept conditions imposed by the Commission in its initial acceptance. Where conditions are imposed by the Commission the applicant has the free choice to accept or reject; to dedicate his property to public service or to refuse so to do; to submit to the jurisdiction of the Commission or to remain beyond the bounds of interstate commerce. This choice cannot be exercised by the applicant if the Commission says, in effect: 'Sell your gas; collect your proposed initial price; we will later tell you if you can keep your collections; if we decide you cannot, you must assure refund by bond.'

* * *

> "But in Atlantic, the applicant was tendered a certificate setting a firm initial rate with a condition allowing potential increase. In the instant case no initial rate is accepted. None is rejected. The applicant is merely asked to speculate as to what the ultimate temporary rate may be, to rely on the ultimate fairness of the final determination, and to meanwhile dedicate its gas to public service. The action of the Commission is neither an acceptance, rejection nor proper conditional acceptance of Sunray's application. It merely purports to hold in abeyance potential conditions. Under such circumstances Sunray is denied its right to have the Commission act upon its application with such certainty as to allow the exercise of choice upon Sunray's part."

In the present case, the temporary certificates did not contain a refund condition. Thus, the vice condemned in *Sunray* was compounded. The Tenth Circuit held illegal an express refund condition which required the producer to speculate as to what the ultimate rate might be for sales under its temporary certificate. Here Petitioner was not even given notice of an indefinite refund obligation. Certainly the "boiler plate" language in Petitioner's temporary certificates referred to by the court below (Appendix B, *infra*, pp. 31-32) did not provide Petitioner with notice of its refund obligation. Identical language is contained in every temporary certificate[11] and has never been construed by the Commission as constituting a refund condition. Nor does the fact that certain intervenors urged a 14.6c per Mcf price in other proceedings[12] cure this lack of notice. (Appendix B, *infra*, p. 32). Under the Natural Gas Act the Federal Power Commission is charged with the responsibil-

[11] The temporary certificate found to be unlawful in the *Sunray* case contained such language.

[12] This assertion was not made in the case of Petitioner's certificate applications until hearings were held on such applications. At that time Petitioner had been delivering gas for over six months.

ity of regulating interstate sales by producers, and what certain intervenors argue in other proceedings could not assure Petitioner of a 14.6c price floor. The only official action on which Petitioner could rely was the 18c per Mcf area price established by the Commission.

2. The conflict between *Sunray* and the decision of the court below is readily apparent. Resolution of this conflict is of importance in the administration of the Natural Gas Act. The Commission has issued literally thousands of temporary certificates without refund conditions. Prior to the decision of the court below, producers assumed that, absent an express refund condition, they were entitled to retain all amounts collected pursuant to unconditional temporary certificates and filed rate schedules.[13] Accordingly, they have paid Federal income taxes, royalties, state production taxes and made other expenditures on the basis of their initial contract prices.

The Tenth Circuit's *Sunray* decision provided additional assurance to these producers that the Commission could not grant unconditional temporary certificates authorizing the collection of initial contract prices and then subsequently tell them what portion of such initial price they were entitled to keep.

Now, these producers are told by the court below that they may have to refund some undetermined part of the initial price being collected pursuant to unconditional temporary certificates. The operating problems due to

[13] Producers acted in reliance upon the established principle of utility law that once payments are made pursuant to an effective filed rate schedule, the recipient cannot be required without prior notice to retroactively refund any part of the payments received. *T.I.M.E.* v. *United States*, 359 U.S. 464 (1959); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944).

the uncertainty created by this decision are readily apparent. For example, producers selling gas pursuant to unconditional temporary authorization pay state production taxes, royalties and Federal income taxes and make other expenditures on the basis of the initial price authorized in such certificates. How will they recoup amounts they are subsequently required to refund?[14] Since there is no basis for a producer to know how much of his initial price may be subject to refund,[15] he cannot protect himself by withholding payment of royalties, taxes, etc., on a part of his initial price. From an accounting standpoint, what contingent liability is a producer to show on his balance sheet for amounts heretofore collected pursuant to unconditional temporary authorization?[16]

It is clear that the actual practical effect of the decision below will disrupt operations in the natural gas producing industry. The economic detriment to the small producer, such as Petitioner, will be particularly acute. He simply cannot assume the risk of irrevocably committing his gas to interstate commerce[17] without knowing what part of his price he will be allowed to retain. In many cases, the sales authorized under his temporary certificate may constitute a substantial part of his total income. This is no academic matter, for sales under temporary certificates often continue for several years. See *FPC* v. *Hunt*, ... U.S. ..... (No. 273, decided March 30, 1964). Thus, a small producer

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[14] The problem is crucial with respect to state production taxes since as a general rule taxes paid to the state will not be refunded unless paid under protest.

[15] This is particularly true where, as in the present case, Petitioner's 16¢ per Mcf initial contract price was actually 2¢ per Mcf *below* the Commission's 18¢ per Mcf area price for new gas sales.

[16] For publicly held companies this is important since the investing public must be able to rely upon their financial statements.

[17] The temporary certificates issued in this case contained the standard provision that once service was commenced it could not be discontinued without permission of the Commission issued pursuant to provisions of the Natural Gas Act.

may be required to curtail his operations until such time as he definitively knows whether he will be required to refund any part of the amounts previously collected pursuant to an unconditional certificate. His ability to borrow may be severely impaired. In summary, economic considerations may preclude the small producer from utilizing the Commission's temporary authorization procedure. This will put him at a competitive disadvantage. Indeed, all producers may be reluctant to irrevocably commit their gas to interstate markets on the basis of temporary certificates if they do not know what portion of the collections they will ultimately be allowed to retain.

3. The decision of the court below affirming the Commission's refusal to consider cost or financial evidence in a Section 7 certificate proceeding is contrary to the decision of this Court in the *CATCO* case.[18]

In the orders under review, the Commission, for the first time, delineated the evidentiary criteria it would consider in deciding the initial price question in producer certificate cases. The Commission stated that "the principal criterion" was whether the proposed price was "in line" with other certificated sales in the area at the time of contract execution, citing this Court's *CATCO* decision. The Commission expressly refused to consider the cost and financial evidence of record. The Commission went even further and gave notice to the natural gas producing industry that it did not consider cost or financial evidence appropriate in a producer certificate case, stating:

> "However, we do not think it necessary or appropriate in a certificate proceeding to consider evidence of area costs or financial requirements, or of individual company costs or financial requirements. Any such

[18] *Atlantic Ref. Co. v. Public Serv. Comm'n*, 360 U.S. 378 (1959).

approach is of limited utility and leads to complicated, long-drawn-out proceedings, detrimental to the public."

In subsequent cases,[19] the Commission has consistently excluded the cost and financial evidence offered by producers in support of their initial contract prices. In each of these cases the Commission has relied upon the blanket condemnation of cost and financial evidence contained in the orders under review as justification for its evidentiary exclusion. Judicial review of the Commission's ruling in certain of these cases is now pending in the courts below.[20]

The Court of Appeals affirmed the Commission's express refusal to consider the cost and financial evidence of record, citing this Court's *CATCO* decision (Appendix B, *infra*, pp. 25-26). It is somewhat anomalous that the court below should cite *CATCO*, for in that case Justice Clark pointedly wondered why the producer applicants had not presented evidence of "relative production costs" for other areas. (360 U.S. at 392-393.)

If the Court of Appeals is correct in its interpretation of *CATCO*, then "the wheel has come full circle."[21] In *CATCO* and its progeny,[22] the courts refused unconditional

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[19] *Amerada Petroleum Corp. et al*, Opinion No. 422, issued March 23, 1964, ... FPC .....; *Texaco Seaboard Inc., et al*, Opinion No. 383, issued March 27, 1963, 29 FPC 593; *Placid Oil Co., et al*, Opinion No. 398, issued July 17, 1963, 30 FPC .....; *United Gas Pipe Line Co., et al*, Opinion No. 399, issued July 17, 1963, 30 FPC .....

[20] See *Ocean Drilling & Exploration Company* v. *FPC*, No. 20989, and related cases in the Fifth Circuit Court of Appeals.

[21] *King Lear*, Act V, Scene 3, Shakespeare.

[22] *United Gas Improvement Co.* v. *FPC*, 290 F. 2d 133 (5th Cir.), *cert. denied* 368 U.S. 823 (1961); *United Gas Improvement Co.* v. *FPC*, 287 F. 2d 159 (10th Cir. 1961); *Public Serv. Comm'n.* v. *FPC*, 287 F. 2d 146 (D. C. Cir. 1960), *cert. denied* 365 U.S. 880 (1961); *United Gas Improvement Co.* v. *FPC*, 283 F. 2d 817 (9th Cir. 1960), *cert. denied* 365 U. S. 879 (1961).

certification of sales of natural gas from fields in South Louisiana because the producer applicants did not offer sufficient evidence to support the proposed initial prices. These decisions held that the Commission's reliance on other certificated sales in the area without supporting evidence was not sufficient to support unconditional certification of the proposed initial prices. In this case, the Commission stated that the only evidence to be considered in a certificate case is that of other certificated sales in the area and that supporting cost or financial evidence will be disregarded.

The need for clarification of the evidentiary standards to be applied in producer certificate cases under Section 7 of the Natural Gas Act is readily apparent. If the Commission's sole function is to look only at other certificated prices in the area and determine the so-called "in-line" price, then let this Court so state. However, if producers are entitled to support their initial contract prices by additional evidence of costs and financial requirements, then let the Court reverse the Commission's universal disregard of all evidence except that related to the determination of the "in-line" price.

The question of what evidentiary standards are to be utilized in Section 7 certificate cases is of vital importance in the administration of the Natural Gas Act. The appropriate evidentiary standards should — in fact, must — be clarified by this Court as soon as possible.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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April 7, 1964

Appendix A.

Pertinent provisions of the Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821, as amended by Act Feb. 7, 1942, c. 49, 56 Stat. 83, 15 U. S. C. 717-717w:

SECTION 7(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: * * * In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [56 Stat. 83; 15 U. S. C. § 717f (c)].

* * * * * * *

SECTION 7(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the oper-

ation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 83; 15 U. S. C. § 717f (e)].

Pertinent provision of the Regulations of the Federal Power Commission under the Natural Gas Act, 18 CFR § 157.28:

§ 157.28 Temporary authorizations.

"Upon the filing of an application for a certificate of public convenience and necessity under §§ 157.23 to 157.27, there also having been filed a rate schedule under §§ 154.91 through 154.102 of this chapter, an independent producer, in the event of an emergency that does not involve immediate danger to life or property, may initiate the sale or transportation of natural gas in interstate commerce and continue such sale or transportation pending final Commission action under sections 4 and 7 of the Natural Gas Act and without prejudice to such rate or other condition as may be attached to the issuance of the certificate: *Provided, however*, That this temporary authorization is applicable and available only subject to the following:

(a) It does not apply to termination of any sale or transportation or with respect to service proposed to commence more than 90 days from the date on which

the temporary authorization is issued by the Commission unless otherwise ordered for good cause shown.

(b) It shall not apply unless such facilities as may be necessary to enable the purchaser of the gas or the person by whom the transportation is to be performed to accept delivery of such gas from the independent producer have been authorized by the Commission or are exempt from the need of such authorization by virtue of the provisions of § 2.55(d) of this chapter.

(c) As part of its application hereunder, or separately, the applicant independent producer must file or have on file (1) a statement of intention to invoke this section, setting forth the facts constituting the emergency requiring such action, which emergency may include, inter alia: drainage, threatened loss of lease, flairing, economic hardship resulting from payment of shut-in royalties, or similar situations; (2) a statement identifying the contract tendered as the rate schedule intended to be effective for the sale or transportation under this temporary authorization; and (3) a statement describing, generally, the facilities necessary to enable the purchaser to take delivery of the gas proposed to be sold or transported.

(d) [Revoked]

Appendix B.

Opinion and Judgment of U. S. Court of Appeals, District of Columbia Circuit.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17582

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
CONTINENTAL OIL COMPANY AND SUNRAY D X OIL COMPANY, SKELLY OIL COMPANY, SUN OIL COMPANY, GEORGE H. COATES, PRADO OIL & GAS COMPANY, PHILADELPHIA ELECTRIC COMPANY, INTERVENORS

No. 17627

CONTINENTAL OIL COMPANY AND SUNRAY D X OIL COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, AND LONG ISLAND LIGHTING COMPANY, INTERVENORS

No. 17628

THE UNITED GAS IMPROVEMENT COMPANY AND LONG ISLAND LIGHTING COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT
SUN OIL COMPANY, SOUTH TEXAS NATURAL GAS GATHERING COMPANY, GEORGE H. COATES, SKELLY OIL COMPANY, CONTINENTAL OIL COMPANY, et al., PRADO OIL AND GAS COMPANY, AND PHILADELPHIA ELECTRIC COMPANY, INTERVENORS

No. 17859

PRADO OIL AND GAS COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, INTERVENOR

On Petitions to Review Orders of the Federal Power Commission

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Decided January 23, 1964

Before FAHY, WASHINGTON and DANAHER, *Circuit Judges*.

FAHY, *Circuit Judge:* Continental Oil Co. and Sunray D X Oil Co., petitioners in No. 17627, and Prado Oil and Gas Co., petitioner in No. 17859, on May 15, 1959, and June 30, 160, respectively, entered into contracts with the South Texas Natural Gas Gathering Company for the sale of natural gas at a price of 16 cents per Mcf. This was part of a larger project involving sales by numerous other gas producers in Texas Railroad District No. 4 to South Texas, to be delivered to Transcontinental Gas Pipe Line Corporation, for resale in interstate commerce. Applications for approval by the Federal Power Commission of sales of the petitioning producers were first filed between May 1959 and January 1960. However, even before notice of these applications had been issued *ex parte* temporary certificates had been granted to most of the producer-applicants authorizing the immediate commencement of the sales at contract prices ranging from 9 to 17 cents per Mcf. None of these certificates provided for any refund should the contract prices subsequently be found to exceed the proper "in-line" price for the area.

After a hearing on the applications the Commission on November 22, 1960, approved the producers' proposed prices. The Public Service Commission of the State of New York, petitioner in No. 17582, sought a rehearing, contending that the proper "in-line" price for the particular area was 14.6 cents per Mcf. The Commission granted a rehearing and consolidated the above applications with thirty-five additional producer applications relating to the same project. Like the producers involved in the first stage of the proceedings these additional producer-applicants had been granted temporary operating certificates containing no refund provision. Hearings were once again held and on January 25, 1962, the Presiding Examiner

issued his preliminary statement approving the proposed sales at prices ranging from 16 to 17 cents. In doing so he relied heavily on the Commission's Statement of General Policy No. 61-1, issued September 28, 1960, in which, as a part of its area pricing policy, the Commission had set the area price for Texas Railroad District No. 4, the origin of the gas, at 18 cents per Mcf.

An August 30, 1962, the Commission issued its own final decision in which it found that the "in-line" price for the area with respect to contracts entered into prior to September 28, 1960, was 15 cents per Mcf.[1] Accordingly, it approved the sales in question on the condition that the price charged be not in excess of 15 cents.[2] It refused, however, to order a refund of the charges in excess of 15 cents collected under the temporary authorizations. The Commission was initially of the opinion that since no refund provision had been included in the temporary certificates there was "no basis for ordering refunds." In its later order of December 18, 1962, denying reconsideration, the Commission explained that it would be inequitable to require refunds when the temporary certificates contained no provision clearly apprising the producers of the risk in operating under a temporary certificate subject to a refund obligation.

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[1] Of eighty-six related applications originally involved in the Commission proceedings only fifteen proposed contract prices were found to be "out of line"; and of the twelve producers whose certificates were conditioned by the Commission on a price reduction all but three, Continental, Sunray and Prado, have apparently accepted the Commission's ruling by not filing a petition for review.

[2] Simultaneously with this order the Commission issued its Fifth Amendment to Statement of General Policy No. 61-1 in which it reduced the area ceiling price level for Texas Railroad District No. 4 from 18 cents per Mcf. to 16 cents per Mcf.

In its final orders the Commission also declared that the provisions in the sales contracts obligating the purchaser to take or pay for a minimum volume of gas on an annual basis were subject to the Commission's final order in a pending rule making proceeding concerning "take or pay" provisions. The Commission subsequently modified this condition so that the producers would not be required to file "take or pay" provisions for less than eighty per cent of the annual contract qualities, regardless of the outcome of the rule making proceeding.

The producer petitioners in Nos. 17627 and 17859 seek review of the orders insofar as they condition approval of the proposed sales (a) on a reduction in the initial price to 15 cents and (b) on the outcome of the rule making proceedings regarding "take or pay" provisions. Petitioners in Nos. 17582 and 17628 seek review of the same orders insofar as they omit to require a refund of excess charges collected under the temporary certificates. Intervenors in Nos. 17582 and 17628 support the Commission in refusing to order refunds.[3]

The Fixing of An In-Line Price of 15 Cents as a Condition to the Permanent Certificates

The Commission was obliged to be guided by *Atlantic Ref. Co. v. Public Serv. Comm'n*, 360 U.S. 378 (1959), known as the *Cateo* decision. The Court there pointed out

[3] In No. 17628 intervenor The South Texas Natural Gas Gathering Company refers to a statement in the brief of petitioners in that case regarding the absence of a provision in its certificate for a "flow-through" of refunds. South Texas states it would agree voluntarily to pass along refunds should they result from this review proceeding, on the condition that petitioners and other customers of Transcontinental Gas Pipe Line Corporation agree that such refunds will be immediately and completely passed along by them to the ultimate consumers so that petitioners and other customers of Transcontinental would not receive a windfall as the result of South Texas' action.

that some of the provisions of the Act regarding rates, notably Sections 4 and 5, entail extremely long delays, calling upon the Commission in Section 7 proceedings to condition certificates by requiring an "in-line" initial price. Accordingly, in granting permanent certificates the Commission is to decide the "in-line" price. This the Commission did in the present cases, fixing it as of the date of the contracts under which the gas was to enter interstate commerce. It determined that the appropriate price for District No. 4 revolved around the situation prevailing there in the years 1958, 1959 and 1960. It considered as the most important evidence a study prepared by the Commission staff analyzing contract and price data for the years 1955 and later. Of the contracts thus analyzed none executed during the 1958 to 1960 period and under permanent certificates involved prices above 18 cents and the majority, involving also the greater volume of gas, were at prices between 14 and 15 cents. And the Commission noted that it had granted certificates for sales in the area during the three years mentioned at prices ranging down to 6 cents per Mcf.[4] In addition, as the opinion points out, nearly all the contracts with prices above 15 cents were subject to litigation. Being under a cloud they were eliminated from consideration. The Commission also placed under the same cloud, or in a suspect category, other contract prices above 15 cents which, though not themselves in litigation, appeared because of the higher prices to be subject to the same infirmities as those which were. The

[4] Continental contends this finds no support in the record. In its opinion on reconsideration the Commission adequately meets this objection by pointing out that the notice it took of prices ranging down to 6 cents "was not a part of the decisional process in determining the line but merely part of our explanation of the scope of the staff exhibit, which treated sales at prices of 14 cents and above. Therefore further evidence on this matter would not affect the basis of our decision."

Commission also gave less consideration to prices allowed under temporary certificates than under permanent certificates, because the former were issued ex parte and informally, without full investigation.

It cannot be seriously contended that the data upon which the Commission relied fails to support its determination of an "in-line" price of 15 cents. It is principally urged that the Commission erred in limiting, as above indicated, the evidence upon which it relied. We now consider these limitations.

As to the exclusion of prices under a cloud the Commission had the support of the opinions of the courts in *United Gas Improvement Co.* v. *FPC*, 283 F.2d 817, 824 (9th Cir. 1960), *cert. denied sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 365 U.S. 879, and *California Co.* v. *United Gas Improvement Co.*, 365 U. S. 881 (1961), and *United Gas Improvement Co.* v. *FPC*, 290 F.2d 133, 137 (5th Cir.), *cert. denied sub nom. Sun Oil Co.* v. *United Gas Improvement Co.*, 368 U.S. 823 (1961); and see our opinion in *Pub. Serv. Comm'n* v. *FPC*, 109 U.S. App. D.C. 292, 295 n. 3, 287 F.2d 146, 149 n. 3 (1960), *cert. denied sub nom. Hope Natural Gas Co.* v. *Pub. Serv. Comm'n*, 365 U.S. 880, and *Shell Oil Co.* v. *Pub. Serv. Comm'n*, 365 U.S. 882 (1961). In the light of these authorities we do not sustain the challenge advanced on this ground. In any event the exclusion of the prices under a cloud does not undermine the validity of the "in-line" price determined by the Commission, considering the evidence in its entirety.

The producer-petitioners make special objection to the Commission's refusal to rely upon a number of sales at 16 to 17 cents made in 1955 and 1956 to the Coastal Transmission Corp. Since the Coastal sales were made before

the 1958 to 1960 period when the contracts in the present cases were entered into and since the majority of the subsequent sales in Texas Railroad District No. 4 were at less than 15 cents, the Commission could reasonably determine as it did that the Coastal sales did not establish a valid line of 16 to 17 cents for that area during the 1958 to 1960 period.

The Commission also pointed out that "the earlier Coastal sales were made to a new company that had neither been given a certificate nor was yet in operation, so may have resulted in higher prices than would have resulted from contracts with an established pipeline." The Commission substantiated this observation on appeal by pointing out that the staff exhibit showed for the 1955-1956 period when the earlier Coastal sales were made that other sales, involving a greater volume of gas, were made to a more established pipeline at prices below 15 cents.

Continental contends that the Commission erred in not considering certain costs and financial requirements, evidence with respect to which was presented to show the amount Continental would be required to receive to recoup its cash outlay with respect to one area of its production here involved, and in failing to consider evidence as to the industry's replacement costs of gas, submitted by Texaco[5] and adopted by the other producers. However, these are not rate cases of the type in which evidence of this kind ordinarily is considered relevant. These proceedings under Section 7, considered with the *Catco* decision, permit the Commission to fix the "in-line" price, not on a basis of cash outlay or replacement costs, but on the basis of the price level established by comparable sales contracted for

[5] The contention in this regard is made by Prado as well as Continental.

by those placing gas in the area in interstate commerce. The standards of Sections 4 and 5 are not those to be used in conditioning a certificate issued under Section 7; otherwise the purpose of *Catco* to avoid the consequences of the well nigh interminable proceedings incident to a rate case would be defeated. See, for example, *United Gas Improvement Co.* v. *FPC*, *supra*, 283 F.2d at 823. Consideration of the proffered evidence was not essential. In so deciding we need not hold that the Commission may never consider such evidence if the circumstances in a particular case move it to do so consistently with its obligations under *Catco*.

Prado contends in No. 1785 that the Commission failed to give adequate consideration to its own Statement of General Policy No. 61-1, as amended, issued September 28, 1960. By this Statement the Commission prescribed guide line initial prices for twenty-three producing areas. It said that in doing so it considered many factors, including cost information from all decided and pending cases, existing and historical price structures, volumes of production, trends in production, et cetera. The guide line initial price for Texas Railroad District No. 4 was 18 cents per Mcf. Thereafter, on August 30, 1962, concurrently with its opinion in No. 362, presently before us, the area initial price for said District was lowered to 16 cents per Mcf. Prado contends that the action of the Commission in conditioning the permanent certificates at a price level below either the 18 cents or 16 cents guide line price is arbitrary and discriminatory. But the area guide line price is only a guide line price; it is not an "in-line" price required by *Catco* to be determined with the issuance of permanent certificates under Section 7(c). As the Commission states, its Policy Statement was a guide to its future action and "cannot effect an automatic

approval of proposed rates, particularly where the contracts were entered into before the Policy Statement." The Commission could not have ignored altogether its own Policy Statement, but it was not required to be controlled thereby in deciding, in the Section 7 proceedings, that the in-line price should be fixed at a less amount on the basis of the evidence analyzed in its opinion.

A somewhat related contention is that the Commission erred in fixing the "in-line" price as of the date of the contracts rather than as of the later date of initial delivery of gas. The Commission answers that the execution of a contract is the significant act of a buyer and seller in determining price, and that the effect of this determination does not await deliveries. We think we must honor the discretion thus exercised by the Commission "to require that the gas sold be sold under contracts that were in-line as of the time they were executed," to adopt its language. The Commission cites *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corps.*, 350 U.S. 332 (1956), to the effect that rates are established initially by the companies by contract or otherwise. The Commission apparently made no general rule for all cases, for it states that "under the circumstances here" the contract prices must be in line as of the time the contracts were executed.

None of the attacks on the "in-line" determination gives the court a basis for holding it to be invalid; and since the data relied upon adequately supports the price condition of the permanent certificates such condition is approved. Contracts under permanent certificates at prices of not more than 15 cents, covering such a large volume of gas from the same area, and for the years which are most relevant, are so numerous that we cannot say that the Commission exceeded its authority in fixing the "in-line" price at 15 cents, notwithstanding its refusal to give

significant consideration to higher prices for earlier years, even though under permanent certificates.

The Take-Or-Pay Provision

The original condition in this regard reads:

> The certificates of all of the producer applicants . . . shall be conditioned so that the take-or-pay requirement in each contract is subject to the provisions of our final order in Docket No. R-199 as of the effective date of that order.

As we have said, in its decision on reconsideration the Commission modified this provision to read that "the producers shall not be required to file take-or-pay provisions for less than 80 per cent of the annual contract quantities."

Docket No. R-199 is the general rule-making proceeding to consider standardization of take-or-pay provisions in producer contracts. Any modification of such contracts which might be required as a result of the proceeding would be prospective only. Should the producers here involved be required to file modified provisions they could then obtain review. See *Midwestern Gas Transmission Co. v. FPC*, 292 F.2d 119 (5th Cir. 1961). The present impact of the proceeding in Docket No. R-199 is too tenuous and uncertain to require the court to pass now upon the validity of what might eventuate, or to hold invalid pursuit of the matter by the Commission. To do the latter would be to say that no modification of the questioned provisions can be validly accomplished. And to do this now would be to rule in the dark.[6]

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[6] Petitioners in No. 17627 attack the validity of the Commission's Fifth Amendment to its Statement of General Policy No. 61-1. However, in determining the validity of the order under review we need not probe the validity of the Amendment; and there is no occasion now to pass upon the Amendment independently of those orders.

The Refund Issue

Petitioners, Public Service Commission of New York, United Gas Improvement Company and Long Island Lighting Company, intervenors before the Commission, contend in Nos. 17582 and 17628 that the Commission is under legal obligation to require as a condition to its grant of permanent certificates that the producers refund that portion of the charges they have collected under temporary certificates in excess of the maximum initial price found by the Commission to be required by the public convenience and necessity.

We consider first the producers' contention that the issuance of the temporary certificates were appealable orders and that the failure of petitioners in Nos. 17582 and 17628 to seek review thereof precludes the relief they now seek, citing *Texaco, Inc.* v. *FPC*, 290 F.2d 149, 156-57 (5th Cir. 1961). But there the challenged conditions were in the temporary certificates. The Court held that if those conditions were deemed to be invalid the question should have been raised before the challenging producers accepted the certificates. "This is true because the failure of petitioners to appeal from the order granting the conditions within the time provided for appeals in Section 19(b) of the Natural Gas Act . . . deprives this court of jurisdiction to entertain a petition to review this order. Clearly, the order granting the temporary certificates, when it embodied the conditions now complained of was an order which then aggrieved the petitioners." *Id.* at 156-57.

The situation here is significantly different. It is true the present petitioners in a loose sense may be said to have been aggrieved by the absence of a refund condition in the temporary certificates, for such a condition would have strengthened their position; but in a jurisdic-

tional sense their aggrievement is with the absence of a refund requirement in the permanent certificates over which we now have jurisdiction. Once this absence became final before the Commission timely review was sought. In this situation we think it is open to petitioners to obtain now a decision on the refund issue.

Coming to the merits the producer intervenors say a refund condition is beyond the Commission's statutory power. As to this we may say initially that our statement in *Atlantic Ref. Co.* v. *FPC*, ... U.S. App. D.C. ....., 316 F.2d 677, 679 (1963), that there is no mechanism for refund of overcharges under Section 7 is not a holding that a refund may never be required when a permanent certificate takes over from a temporary one, an issue not there considered.

The producers argue that in any event refunds may not be required because the Commission lacks power "to set retroactive rates or award reparations," citing *Hope Natural Gas Co.* v. *FPC*, 134 F.2d 287, 309-10 (4th Cir. 1943), *rev'd on other grounds*, 320 U.S. 591 (1944). But there the Court was referring to the power of the Commission with respect to rates which had become unconditionally effective when filed, subject to being changed only prospectively in a proceeding under Sections 4 or 5(a) of the Act. The Court was not ruling upon the power of the Commission to condition a permanent certificate by requiring refunds of excessive prices charged and received under temporary certificates.[7] We think it is clear that a refund can be required when the temporary certificate is so conditioned. The serious question is whether it can

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[7] As to the power see *Texaco, Inc.* v. *FPC*, 290 F. 2d 149, 156 (5th Cir. 1961); *Pure Oil Co.* v. *FPC*, 292 F. 2d 350, 352-54 (7th Cir. 1961). Compare, however, *Sunray Mid-Continent Oil Co.* v. *FPC*, 270 Fd 2d 404 (10th Cir. 1959).

be required when the temporary certificate is not so conditioned.

As to this the Commission itself, though it did not require refunds in these cases, does not disclaim the power. The basic purpose of the Natural Gas Act is consumer protection from unreasonable prices, and refund of excessive utility rates is a well recognized remedy. It would need to be quite clear from the Act that the Commission lacked the power to use such a remedy for the courts to deny it. We find no such clarity. The power does not depend upon an explicit refund provision in a temporary certificate. Should the occasion be appropriate for its exercise, the power resides in the Commission when it grants a permanent certificate. To hold that it may not then require refund of excessive prices previously permitted without notice or hearing or mature consideration, since the Commission acted on an emergent and temporary basis, would be inconsistent with the regulatory responsibility of the Commission to aid in the ascertainment and authorization of just and reasonable rates.

Section 7(e) provides, "The Commission shall have the power to attach to the issuance of the certificate . . . such reasonable terms and conditions as the public convenience and necessity may require." 56 Stat. 84 (1942), 15 U.S.C. § 717(f)(e) (1958). And the temporary certificates before us provide:

> This acceptance for filing shall not be construed as constituting approval of any rate, charge, classification, or any rule, regulation or practice affecting such rate or service contained in the rate filing; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings or orders which may be made in the final disposition of this proceeding or any other final

ings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company.

* * * * * * *

This constitutes all requisite temporary authorization to commence the sale of gas, but such authorization and acceptance of the rate schedule are without prejudice to such final disposition of the certificate application as the record may require and, furthermore, once service is commenced under this authorization it may not be discontinued without permission of the Commission issued pursuant to the provisions of the Natural Gas Act.

These provisions, all else aside, amply support authority for conditioning the permanent certificates by a refund requirement. As we have indicated, to order refund of rates found to be excessive is not an unusual remedy; and it is not unavailable under the Natural Gas Act due to the fact that in some instances the parties are not explicitly notified early in the proceedings that such a remedy may be imposed.[8]

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[8] The producers rely upon the Tenth Circuit's decision in *Sunray Mid-Continent Oil Co.* v. *FPC*, 270 F.2d 404 (1959). The Court there held that even in attaching a refund condition to a temporary certificate the Commission must limit it by setting a price at or below which the producers can sell without risk of subsequent refund order. The Court felt that without such a limit on the refund obligation the Commission's grant of temporary authority was too vague to allow the producers to decide intelligently whether to accept the Commission's conditional grant and thereby commit its gas reserves to interstate commerce.

To the extent that our decision may be inconsistent with *Sunray* we are constrained respectfully to disagree with the latter. Moreover, it should also be pointed out that as a practical matter the producers in this case were relatively assured of being able to sell their gas without risk of subsequent refund at a price of 14.6 cents per Mcf., the price which PSC and the other consumer interests originally urged as the proper in-line price.

The existence of the power, however, does not mean that its exercise is mandatory, as petitioners in Nos. 17582 and 17628 assert. Here we follow the standard adopted by the Commission, namely, the standard of equity — that is, the issue of a refund in the present circumstances turns upon equitable considerations. But we do not follow the Commission in holding also that the sole and decisive equitable consideration here is the absence of a refund requirement in the temporary certificates. That would amount to saying that in the absence of such a condition in the temporary certificates refunds may not be required, a position we cannot accept. We recognize the Commission's duty to consider the extent to which a refund obligation in the absence of prior warning will, by increasing the risk producers must bear, affect the quantity and continuity of the supply of gas and thus have an adverse effect on the interests of consumers. But there are public interest factors of equity which must be weighed along with the effect of mere absence of a refund condition in the temporary certificates. One of these is the very fact that excessive prices were obtained while the proceedings pended, and after it was known an "in-line" price above 14.6 cents was being protested. See note 8-*infra*. The public interest, as represented by the consumer interest, is not necessarily, or entirely, offset by the absence of an explicit refund condition in the temporary certificates, especially when those certificates contained the general conditions to which we have herein above referred. We do not attempt an enumeration of all equitable considerations involved. These are better left for at least initial Commission consideration in all the circumstances. We do hold, however, that the mere absence of the condition in the temporary certificates is insufficient to cast the full burden of excessive charges upon

the consuming interests. There must be, with the assistance of the parties, a broader and more penetrating analysis and consideration of the factors pro and con a refund, and its amount or extent, in arriving at an equitable conclusion.

The refund issue requires further development and fuller consideration of the equitable factors other than those thought to flow from the mere absence of an explicit refund condition in the temporary certificates.

Nos. 17627 and 17859 affirmed. Nos. 17582 and 17628 remanded for further proceedings consistent with this opinion.

Appendix C.

Opinion of U. S. Court of Appeals, Tenth Circuit.

SUNRAY MID-CONTINENT OIL COMPANY, Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent (two cases).

Nos. 6043, 6061.

United States Court of Appeals

Tenth Circuit.

Sept. 1, 1959.

Rehearing Denied Sept. 28, 1959.

Before BRATTON, Chief Judge, and PHILLIPS and LEWIS, Circuit Judges.

LEWIS, Circuit Judge.

These two cases were consolidated on review upon the representation that the determination of a single question of law would be dispositive of both cases, that question being: Can the Federal Power Commission impose conditions upon the grant of a temporary certificate of public convenience and necessity? Our study indicates that although the stated question is present in each case separate consideration of the cases is necessary because of factual differences of legal significance.

No. 6043. The Petitioner, an independent producer of natural gas, in conjunction with applications for permanent certificates of convenience and necessity for the sale of

gas, sought temporary authorization from the Commission to initiate such sales pending determination of the applications for permanent certificates. The temporary authority was sought pursuant to the statutory authority granted the Commission by Section 7(c) of the Natural Gas Act, 15 U.S.C.A. § 717 et seq., and in full compliance with Commission regulation 157.28.[1] Authorization to begin tempor-

[1] 157.28 Temporary authorizations.

"Upon the filing of an application for a certificate of public convenience and necessity under §§157.23 to 157.27, there also having been filed a rate schedule under §§ 154.91 through 154.102, an independent producer, in the event of an emergency that does not involve immediate danger to life or property, may initiate the sale or transportation of natural gas in interstate commerce and continue such sale or transportation pending final Commission action under Sections 4 and 7 of the Natural Gas Act and without prejudice to such rate or other condition as may be attached to the issuance of the certificate: *Provided, however*, That this temporary authorization is applicable and available only subject to the following:

"(a) It does not apply to termination of any sale or transportation or with respect to service proposed to commence more than 30 days from the date of the filing of the statement required in paragraph (c) of this section.

"(b) It does not apply unless the purchaser of the gas or the person for whom the transportation is to be performed has been authorized to construct and operate such facilities as may be necessary to enable him to accept delivery of such gas from the independent producer.

"(c) As part of its application hereunder, or separately, the applicant independent producer must file or have on file (1) a statement of intention to invoke this section, setting forth the facts constituting the emergency requiring such action, which emergency may include, *inter alia*, drainage, threatened loss of lease, flaring, economic hardship resulting from payment of shut-in royalties, or similar situations; and (2) a statement identifying the contract tendered as the rate schedule intended to be effective for the sale or transportation under this temporary authorization.

"(d) Notice by the Secretary of the acceptance of the rate filing and the statements made under this section shall constitute a waiver by the Commission of the 30-day advance filing requirements of §§ 154.92(b) or 154.94(b), and the proposed temporary sales or transportation may proceed forthwith."

ary service was initially denied by the Commission but, after protest by Sunray, was granted by letter order dated January 30, 1958. The letter of authorization contained the following statement:

> "This constitutes all requisite temporary authorization to commence the sale of gas, but such authorization and acceptance of the rate schedule are without prejudice to such final disposition of the certificate applications as the record may require and furthermore, *once service is commenced under this authorization it may not be discontinued without permission of the Commission issued pursuant to the Natural Gas Act.*" (Emphasis added.)

Sunray initiated deliveries upon receipt of the Commission letter order but informed the Commission by letter that:

> "Accordingly, Sunray * * * will only continue such sale * * * pending final Commission action under Sections 4 and 7 of the Natural Gas Act upon the respective applications for certificates of public convenience and necessity covering such sales. Sunray retains its right to accept or reject such certificates of public convenience and necessity as may be issued and to cease deliveries of gas in the event final action of the Commission on said applications for certificates of public convenience and necessity does not grant certificates of public convenience and necessity in accordance with the said applications."

After receipt of this letter from Sunray, the Commission rescinded its grant of temporary authority asserting that Sunray had evinced an unwillingness to comply with the Commission's lawful authority. Thereafter, ex parte, the Commission reinstated the temporary authorization, this time stating as its reason that its order of rescission had been premised upon the erroneous belief that Sunray had

not initiated deliveries so as to affect public convenience and necessity in such aspect. The reinstatement order reiterated the Commission's earlier contention that Sunray could not terminate its service except by express permission of the Commission. It is in opposition to this contention that Sunray brings the cause to this court after unsuccessfully seeking a rehearing before the Commission.

[1] The right of this court to review orders of the Federal Power Commission is limited by Sec. 19(b) of the Natural Gas Act to instances where the petitioner is presently aggrieved by the imposition of such orders. This compulsion leads us to hold that the present petition is premature. The able and comprehensive presentation of counsel, pointing to the complexities of right and duty that may occur if Sunray can lawfully be required to furnish service under a temporary authorization extended beyond determination of its application for a permanent certificate (as the Commission apparently contends), or if Sunray can arbitrarily reject a permanent certificate and thereupon cease service under its temporary authorization and as a matter of right (as Sunray contends), considers but eventualities. Sunray is currently selling its gas and has made no affirmative effort to cease. The Commission has made no objection to the status quo. Regardless of Sunray's present apprehension and the Commission's present warnings it will take further administrative action to create an actual grievance. Under these circumstances, it is obvious that "the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action," Rochester Telephone Corp. v. United States, 307 U.S. 125, 59 S.Ct. 754, 757, 83 L.Ed. 1147, and hence is not reviewable under Sec. 19(b), 15 U.S.C.A. § 717r; see Federal Power Commission v. Hope Natural Gas Co., 320 U.S.

591, 64 S.Ct. 281, 88 L.Ed. 333. If, as Sunray contends the Commission has no power to condition temporary certificates or has imposed an unlawful condition, the actions have no present impact upon Sunray. For this reason, the appeal in Case No. 6043 is dismissed.

No. 6061. Here again Sunray applied to the Commission for temporary authorization to sell gas pending final determination of its application for a permanent certificate of public convenience and necessity. By letter order dated September 17, 1958, the application for temporary authority was accepted by the Commission:

> "* * * subject to the condition that the price received by Sunray for its interest in the production from the jointly owned lease here involved will be that ultimately found to be just and reasonable in the operator's rate suspension proceedings, Docket Nos. G-11710 and G-14248.[2] In addition, Sunray shall submit a statement to this Commission as to its willingness to accept a permanent certificate of public convenience and necessity, in the subject, docket on the same basis and further conditioned to require the filing of an undertaking to assure refund to the purchaser of any portion of the increased rates found by the Commission in the aforementioned suspension proceedings not justified."[3]

Petitioner applied for rehearing which was denied, two commissioners dissenting. Thereafter on January 23, 1959, the Commission, *sua sponte*, modified its order denying rehearing by substituting, for the language cited above the following:

> "Such acceptance shall be subject to any conditions with respect to price which the Commission may law-

[2] These proceedings did not involve Sunray directly but were those of an operator selling from the same field.

[3] The letter orders also stated that once service was initiated it could not be discontinued without Commission authorization.

fully impose in issuing a certificate of public convenience and necessity in this Docket No. G-16134. In addition, Sunray shall submit a statement to this Commission as to its willingness to file an undertaking to assure refund of any portion of the difference, if any, between the proposed initial price of 16.4¢ per Mcf and the level of any price which the Commission may lawfully find to be required by the public convenience and necessity after hearing has been held with respect to the permanent certification of the sale of natural gas by Sunray."[4]

Sunray's second petition for rehearing was denied, one commissioner dissenting, and this petition for review followed. Sunray has not initiated service under the purported authority of the Commission order.

[2] Since the acceptance order of the Commission is clearly and unequivocally conditioned in such a manner as to immediately affect Sunray if that company should initiate temporary service it is apparent that petitioner can presently question the right of the Commission to condition temporary certificates at all and, in particular, as done in the instant case. The only authority for the issuance of temporary certificates lies in the proviso of Sec. 7(c) of the Natural Gas Act:

"*Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or [illegible]serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in

[4] See footnote 3.

the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83, (1942); 15 U.S.C.A. § 717f(c).]"

[3] The authority so granted is to be exercised summarily and no specific provision for review is contained in the statute. It follows that such power is limited only by the general purposes of the Natural Gas Act and by constitutional restrictions.

[4] The power of the Commission to impose conditions upon the issuance of permanent certificates is now well established by statute and case. Sec. 7(e), Natural Gas Act. Oklahoma Natural Gas Co. v. Federal Power Commission, 103 U.S.App.D.C. 256, 257 F.2d 634; Atlantic Refining Co. v. Public Service Commission, 360 U.S. 378, 79 S.Ct. 1246, 3 L.Ed.2d 1312. And while no specific statutory authority exists for the imposition of conditions upon temporary certificates such authority seems to us to be inherent in the power to summarily grant or reject applications for temporary service pending final determination of applications for permanent certificates. See Colorado Interstate Gas Co. v. Federal Power Commission, 10 Cir., 142 F.2d 943. In most instances the power to summarily reject outright is more drastic than to conditionally grant. And certain it is that temporary service of gas is such an integral part of the overall function of public service as to be indistinguishable, in practical aspect, from permanent service from the standpoint of the consumer public. We hold, therefore, that the power of the Commission to issue temporary certificates under Sec. 7(c) of the Act is not limited to the power to accept or reject the application under the terms submitted by the applicant and that the Commission may tender a conditional acceptance. This court reached a similar result in Sunray Mid-Continent Oil Co. v. Federal Power Commission, 10 Cir., 239 F.2d 97

where a conditional application for a permanent certificate was considered. See also Sunray Mid-Continent Oil Co. v. Federal Power Comm., 10 Cir., 267 F.2d 471.

It does not follow that the broad power granted the Commission to summarily act upon applications for temporary certificates is an absolute power. If the Commission deems it in the public interest to accept an application conditionally such conditional acceptance must be in accord with the provisions of the Act and must meet the test of constitutional due process. By filing an application with the Commission the applicant does not submit irrevocably to the jurisdiction of the Commission. Atlantic Refining Co. v. Public Service Commission, supra. It is by the initiation of public service that the applicant's property becomes dedicated to that public service and the jurisdiction of the Commission's regulatory control within the statutory limits of the Act. The Act contemplates that the Commission need not accept the conditions contained in an application. Sunray Mid-Continent Oil Co. v. Federal Power Commission, supra; it likewise contemplates that the applicant need not accept conditions imposed by the Commission in its initial acceptance. Where conditions are imposed by the Commission the applicant has the free choice to accept or reject; to dedicate his property to public service or to refuse so to do; to submit to the jurisdiction of the Commission or to remain beyond the bounds of interstate commerce. This choice cannot be exercised by the applicant if the Commission says, in effect: "Sell your gas; collect your proposed initial price; we will later tell you if you can keep your collections; if we decide you cannot, you must assure refund by bond."

In Atlantic Refining Co. v. Public Service Commission, supra, the Supreme Court recognized the right and duty of the Commission to give consideration to the reasonableness

of a proposed price under Sec. 7 proceedings upon an application for a permanent certificate. The reasoning authorizing such consideration is equally applicable to the issuance of temporary certificates. Said that Court:

> "Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary.
>
> "This is not an encroachment upon the initial rate-making privileges allowed natural gas companies under the Act, United Gas Pipe Line Co. v. Mobile Gas Service Corp., supra [350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373], but merely the exercise of that duty imposed on the Commission to protect the public interest in determining whether the issuance of the certificate is required by the public convenience and necessity, which is the Act's standard in § 7 applications. In granting such conditional certificates, the Commission does not determine initial prices nor does it overturn those agreed upon by the parties. Rather, it so conditions the certificate that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act. Section 7 procedures in such situations thus act to hold the line awaiting adjudication of a just and reasonable rate. * * *" [360 U.S. 378, 79 S.Ct. 1255.]

[5] But in Atlantic, the applicant was tendered a certificate setting a firm initial rate with a condition allowing potential increase. In the instant case no initial rate is accepted. None is rejected. The applicant is merely asked to speculate as to what the ultimate temporary rate may be, to rely on the ultimate fairness of the final determina-

tion, and to meanwhile dedicate its gas to public service. The action of the Commission is neither an acceptance, rejection nor proper conditional acceptance of Sunray's application. It merely purports to hold in abeyance potential conditions. Under such circumstances Sunray is denied its right to have the Commission act upon its application with such certainty as to allow the exercise of choice upon Sunray's part.

The case is remanded for further proceedings.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1025

SKELLY OIL COMPANY, CONTINENTAL OIL COMPANY, SUNRAY DX OIL COMPANY, ET AL., *Petitioners*,

v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, ET AL., *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, ET AL., *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners[1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on January 23, 1964.

---

[1] The petitioner not identified in the caption herein above is George H. Coates, an individual. The fourth respondent is Long Island Lighting Company.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia is not yet reported. It is reprinted in Appendix B hereto, *infra*, pp. 10a-25a. The opinion of the Federal Power Commission (R. 9723-9760), which was reviewed by the Court of Appeals, is reported in 28 F.P.C. 401 (1962) and is reprinted in Appendix C hereto, *infra*, pp. 26a-81a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1964 (R. 749). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTION PRESENTED

Whether the Federal Power Commission has the power, by attachment of condition to certificates of public convenience and necessity granted under Section 7 of the Natural Gas Act, to order reparations of amounts received from the sale of gas under temporary certificates which did not contain conditions for possible refunds.

STATUTE INVOLVED

The statutory provisions involved are contained in Sections 4, 5, and 7 of the Natural Gas Act, 52 Stat. 822 (1938), as amended, 15 U.S.C. §§ 717c, 717d, and 717f. These Sections are printed in Appendix A, *infra*, pp. 1a-9a.

STATEMENT

The Commission's opinion under review granted certificates of public convenience and necessity to each Petitioner authorizing it to sell natural gas to South Texas Natural Gas Gathering Company (South Tex-

as) (R. 9723-9760). These certificates conditioned the price which could be charged prospectively to 15.0 cents per thousand cubic feet (Mcf) (R. 9754). The Commission refused to require reparations of amounts which had been collected pursuant to the filed rate schedules and in accordance with temporary certificates which contained no conditions providing for possibility of refunds (R. 9742). However, the court below held that the Commission can order such reparations and remanded for a determination of the "equitable factors" involved. Petitioners challenge the Commission's power to order reparations in these circumstances.

In February, 1959, South Texas entered into a contract with Transcontinental Gas Pipe Line Corporation, an interstate pipeline company, agreeing to provide 150,000 Mcf of natural gas per day for delivery in LaSalle County in southern Texas. The initial phase of this project was to provide 50,000 Mcf per day, commencing in December, 1959 (R. 6653), with deliveries increasing in annual increments of 50,000 Mcf per day in December, 1960, and December, 1961 (R. 9729).

Petitioners were among forty-nine producers which contracted with South Texas for the sale of natural gas produced in Texas Railroad District No. 4 to enable South Texas to meet the first 50,000 Mcf daily requirement.[2] Producer prices ranged from 9 to 17 cents per Mcf (R. 8525). Each Petitioner entered into a gas sales contract providing, among other things, for a rate of 16.0 cents per Mcf.

[2] Sunray DX Oil Company, one of the Petitioners herein, contracted with South Texas at a later date. Its gas was included in the second increment of 50,000 Mcf.

Petitioners and other producers filed applications with the Commission seeking permanent certificates of public convenience and necessity authorizing their sales under Section 7 of the Natural Gas Act. Because of excessive delay attendant with processing producer applications and resulting irreparable loss, Petitioners requested temporary certificates so that their sales could begin pending action upon the permanent certificates.

The Commission issued temporary certificates to Petitioners authorizing them to begin their sales to South Texas at their contract rates of 16.0 cents per Mcf (R. 7918, 7922, 7934, 8111, 8267).[3] During this period the Commission also issued temporary certificates to the other producers. The temporary certificates granted to Petitioners were in the standard form issued by the Commission known as "non-conditioned" or "unconditional" temporary certificates, as distinguished from "conditioned" temporary certificates in which the Commission includes express provisions for possible refunds of amounts collected pending action on the "permanent" certificates (See *e.g.*, R. 7918, 7922, 7934, 8111).[4]

---

[3] The temporary certificate initially tendered to Skelly Oil Company was revoked by letter of November 12, 1959, because Skelly, being unable to begin deliveries immediately, had not requested a temporary certificate (R. 7934). However, later, before issuance of the Commission's final order, Skelly applied for and received a non-conditioned temporary certificate and began sales thereunder (R. 9250-9262, 9423).

[4] In the opinion under review, the Commission expressly found that the temporary certificates issued to Petitioners "did not require nor suggest a refund." (R. 10013.) For a further discussion of types of temporary certificates issued by the Commission see *infra*, pp. 14-15, 23.

Petitioners began deliveries under their filed rate schedules pursuant to their non-conditioned temporary certificates. Hearings on the applications for permanent certificates began March 7, 1960; an examiner's decision authorizing all the producer sales in the first phase at contract rates was issued September 8, 1960 (R. 8512-8532), and the Commission affirmed the examiner by order issued November 22, 1960 (R. 8746-8759).

On December 22, 1960, the Respondent, Public Service Commission of State of New York (PSC), applied for rehearing contesting the 16.0-cent price at which the Commission had authorized Petitioners' sales in the permanent certificates, but making no contention for reparations of amounts collected pursuant to the non-conditioned temporary certificates (R. 8816, 8831). On January 19, 1961, the Commission granted rehearing on the question of rate level for the permanent certificates (R. 8938-8939).

During the period while hearings were being held on producer applications for this first phase of the South Texas project, thirty-six additional producers had filed applications for sales to South Texas to supply gas for the second phase at prices equal to or less than the 18-cent area guideline announced in the Commission Statement of General Policy No. 61-1 (R. 9729-9732). As noted above, *supra*, p. 3 n. 2, sunray's sale was included in this group. South Texas proposed to utilize this additional gas in satisfaction of the second phase of its project (R. 9729).

At this juncture, it should be noted that during this period while final action on the permanent certificates was pending, the Commission, in its Statement of Gen-

eral Policy No. 61-1, issued on September 28, 1960, contemporaneously with its *Phillips Petroleum Co.*, Opinion No. 338 (24 F.P.C. 537), had announced an 18-cent guideline price level at which it would certificate producer prices in Texas Railroad District No. 4, the area involved. In announcing its guideline prices the Commission stated its purpose, as follows (24 F.P.C. 818):

> "[to] serve as a guide to us and to interested parties in determining whether proposed initial rates should be certificated without a price condition and whether proposed rate changes should be accepted or suspended."

The Commission granted temporary certificates to the additional producers whose gas would comprise the second 50,000 Mcf increment for South Texas and held hearings upon their applications concurrently with the rehearing on applications which comprised the first phase. An examiner's decision on the consolidated first and second phases, issued January 25, 1962 (R. 9474-9503), granted permanent certificates to Petitioner for their sales at their contract rate levels.[5] No reparations were ordered (R. 9500-9503). Exceptions were taken by PSC, The United Gas Improvement Co. (UGI) and Long Island Lighting Co. (LIL), to certification of the rate levels, but no question was raised

[5] This Court had occasion to consider the effect of the Commission's Statement of General Policy No. 61-1 and the guideline prices there enumerated when reviewing the *Phillips* opinion. See *Wisconsin* v. *F.P.C.*, 373 U.S. 294, 298-299 (1963).

[6] The examiner would have reduced the rate chargeable by one of the producers whose case is not here on review. Disapproval of the initial price was not based upon the level of the rate but because of affiliation between buyer and seller (R. 9497).

as to reparations of amounts collected during pendency of the non-conditioned temporary certificates (R. 9576-9589, 9649-9658).

On August 30, 1962, the Commission issued its Opinion No. 362 (R. 9723-9760). In that opinion it reversed its previous position taken in its order of November 22, 1960, and reduced the level of initial prices chargeable prospectively under the producers' permanent certificates to 15 cents per Mcf (R. 9754). Directing its attention to the validity of the rates collected during pendency of the temporary certificates, the Commission held (R. 9742):

> "... Under these circumstances we believe that there is no basis for ordering refunds for the period, prior to the effective date of the permanent certificates being issued herewith, during which the producers were receiving the higher prices unconditionally authorized in their temporary certificates."

Upon applications for rehearing filed by PSC, UGI, and LIL, the Commission affirmed its refusal to order reparations adding as an additional reason therefor (R. 10013-10014):

> "... The essence of our conclusion on this point is that it would be inequitable to require the producers to make refunds where they were issued temporary certificates in general language without specific provision for refunds. They undertook service thereby, binding themselves to deliver gas until relieved by us under a certificate that *did not require nor suggest a refund.* * * *.
>
> "A refund has been required when the permanently certificated rate is less than the temporary one but in such a case specific language advising the parties of the risk they took if they accepted

the temporary certificate has *uniformly* been used. Since in the present proceeding there is no such provision in the temporary certificates to proceed now and order the producers to make refunds would not be equitable regardless of any ultimate right we may have to order such refunds." [Emphasis supplied.]

On review, the court below concluded, despite the absence of conditions providing for possible refunds in the temporary certificates that the Commission has power, when issuing permanent certificates, to condition the permanent certificates to require reparations of amounts collected pursuant to the non-conditioned temporary certificates (*infra*, p. 23a).

REASONS FOR GRANTING WRIT

1. Decision Below Conflicts With Principles Announced By This Court

The holding of the court below that the Commission has the power to order reparations of amounts collected pursuant to non-conditioned temporary certificates is in direct conflict with the holdings of this Court that the Commission has no reparations power. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 254 (1951); *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944); *T.I.M.E., Incorporated* v. *United States*, 359 U.S. 464, 470-471, 474-475 (1959).[7] The lower court's holding that the Commission has power to fix rates retroactively when issuing a permanent certificate is contrary to this

[7] It is well established that the Commission's rate powers under the Federal Power Act "are substantially identical to" its rate powers under the Natural Gas Act. *F.P.C.* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 350-351 (1956).

Court's determination in *Atlantic Refining Co., et al. v. Public Service Commission of State of New York*, 360 U.S. 378, 392 (1959) that the Commission does not have such power.

In concluding that the Commission has the power to order reparations the Court of Appeals would thwart the definitive holding of this Court in *Montana-Dakota* that the Commission does not have reparations power for this Court there held (341 U.S. at 254):

> "The fact that the Congress withheld from the Commission power to grant reparations does not require courts to entertain proceedings they cannot themselves decide in order indirectly to obtain Commission action which Congress did not allow to be taken directly. There is no indication in the Power Act that that was Congress' intent."

"S. Rep. No. 621, 74th Cong., 1st Sess. 20."

Plainly, the Court's decision below would grant the Commission power to order reparations even though Congress withheld such power from the Natural Gas Act.

Moreover, the decision of the court below enabling the Commission to grant reparations would contradict this Court's holding in *Montana-Dakota* that (341 U.S. at 251):

> "[a purchaser] can claim no rate as a legal right that is other than the filed rate, whether fixed or *merely accepted* by the Commission, and not even a court can authorize commerce in the commodity on other terms." [Emphasis supplied].

In this connection there can be no doubt that Petitioners' 16.0-cent rates were "accepted by the Commis-

sion" for the Commission expressly so stated in its letter orders granting temporary certificates. (See, *e.g.* R. 8111.)

After issuance of the non-conditioned temporary certificates and acceptance of Petitioners' rate schedules for filing Petitioners instituted service and collected their contract rates of 16.0 cents per Mcf. They continued to collect their filed rates, without contingency for refund, or even any notice that a contention for reparations might be made, until after the issuance of the permanent certificates in the Commission's Opinion No. 362 which is the genesis of this review. For the period of the effectiveness of the non-conditioned temporary certificates, Petitioners' filed rates were the legal rates for which "not even a court can authorize" sales on other terms (*Ibid*).

The court's opinion below also conflicts with this Court's decision in *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944) where this Court stated (at 618):

> "It is conceded that under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those 'to be thereafter observed and in force.'"

If any question as to lack of power to order reparations remained, it was conclusively dispelled in *T.I.M.E., Incorporated* v. *United States*, 359 U.S. 464, 469-471 (1959) where this Court held (at 470):

> "The structure and history of Part II (the Motor Carrier Act), however, lead to the conclusion that here, as in the Federal Power Act, Congress did not intend to give shippers a statutory cause of action for the recovery of allegedly unreasonable past rates, or to enable them to assert 'unreason-

ableness' as a defense in carrier suits to recover applicable tariff rates."

Having in mind that the Commission expressly found (R. 1001;3) that the temporary certificates did not contain price conditions, the contentions of PSC, PGI, and LIL in their petitions for review that the Commission should have ordered refunds constituted nothing more than an indirect suit for reparations despite the fact that such an avenue is foreclosed to them by the Natural Gas Act.

Respondents gain no support because this review proceeding arose under Section 7 for that Section does not clothe the Commission with power which has been consistently denied to it. In the words of this Court in the *T.I.M.E.* case (359 U.S. at 475):

> "To permit a utilization of the procedure here sought by the Government would be to engage in the very 'improvisation' against which this Court cautioned in Montana-Dakota, supra, in order to permit the I.C.C. to accomplish indirectly what Congress has not chosen to give it the authority to accomplish directly."

In any event, this Court in its definitive opinion in *Atlantic Refining Co., et al.* v. *Public Service Commission of State of New York*, 360 U.S. 378 (1959), delineated the Commission's conditioning power under Section 7 of the Act making it clear that the Commission has no power under that Section to fix or overturn contract rates. Thus, this Court emphasized (360 U.S. at 391-392):

> "This [the conditioning power] is not an encroachment upon the initial rate-making privileges allowed natural gas companies under the Act,

> United Gas Pipe Line Co. v. Mobile Gas Service Corp., supra, but merely the exercise of that duty imposed on the Commission to protect the public interest in determining whether the issuance of the certificate is required by the public convenience and necessity, which is the Act's standard in § 7 applications. *In granting such conditional certificates, the Commission does not determine initial prices nor does it overturn those agreed upon by the parties.*" [Emphasis supplied.]

Such power to prescribe conditions under which service may be rendered in the future, as distinguished from fixing rates, gives effect to the "single statutory scheme under which all rates are established initially by the natural gas companies." *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 341 (1956). Further, as this Court noted in the *Atlantic* case, the Commission "was not given power to suspend rates under § 7," and under Section 5, the rate fixing provision of the Act, the Commission's power is prospective only (360 U.S. 389-390).

As recently as March 30, 1964, this Court again passed upon this question of the lack of Commission power to fix or overturn rates in a certificate proceeding. Thus, in *F.P.C.* v. *Hunt*, ___ U.S. ___, No. 273, October Term 1963, this Court held that the Commission's rate-fixing power resides in Sections 4 and 5 of the Act, and that the certification procedure under Section 7 "to lay down conditions precedent to entry of natural gas into interstate commerce" does not impair the vitality of the rate provisions of Sections 4 and 5 (slip opinion, pp. 8-12). On the contrary, "under the procedures of the Act, it is at the point of permanent or unconditional temporary certification that the [rate]

provisions of [the Act] become applicable." (Slip opinion, p. 9.)

Since Petitioners here sold their gas under unconditional temporary certificates, the procedures of the Act require that only Sections 4 or 5 could be invoked to change Petitioners' rates. And these Sections deny the Commission power to order reparations. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra; F.P.C.* v. *Hope Natural Gas Co., supra.*

In contrast, the action of the court below would grant to the Commission precisely the power which this Court held to be absent from Section 7. For the lower court would, through a condition to a certificate, *infra*, p. 23a, authorize the Commission to overturn and fix Petitioners' initial prices established by contract, accepted for filing by the Commission, and collected under non-conditioned temporary certificates by Petitioners.

This petition presents a case of first impression. In the ten years since regulation of independent producers began with *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954) the Commission has never asserted the power to order reparations of any amount collected pursuant to non-conditioned temporary certificates (R. 10014). Nor has any contention been made for such reparations. Until this proceeding, no court has ever held that the Commission has such reparations power. These circumstances clearly impel this Court to grant this petition for *certiorari* to correct the error in the lower court's opinion.

2. Decision Below Conflicts With Decisions in Other Circuits

In addition to the direct conflict with the principle that the Commission has no reparations power, the decision below is incompatible with decisions of other circuits, particularly *Sunray Mid-Continent Oil Company* v. *F.P.C.*, 270 F.2d 404 (10th Cir. 1959) and *Signal Oil and Gas Co.* v. *F.P.C.*, 238 F.2d 771 (3rd Cir. 1956). Indeed, the court below admits that its decision is in conflict with the Tenth Circuit's decision in the *Sunray* case (*infra*, p. 24a). Unless this conflict is resolved, administration of the Natural Gas Act and the rights and obligations of the parties thereunder will vary from case to case depending upon which court of appeals has review jurisdiction.

In the *Sunray* case the Commission had tendered to Sunray a temporary certificate permitting collection of the contract rate. However, the temporary certificate contained a price condition providing for refunds of indefinite amounts to be later determined based upon the rate to be made applicable under the permanent certificate. In parlance of Commission practice this was known as a "floorless" condition, because there was no stated minimum below which refunds could not be required.[8] In striking down this "floor-

[8] In cases where the contract rate exceeds the Commission's guideline price the Commission customarily issues temporary certificates with conditions providing for possible refunds down to a stated minimum. In other cases where the proposed price exceeds the guideline price, conditions provide for an immediate reduction in the rate before service begins with no provision for refunds of amounts collected pursuant to the temporary certificate. None of these conditions was attached to temporary certificates issued in the consolidated proceedings before the Commission which were reviewed by the court below.

less" condition the court in the *Sunray* case held (270 F.2d at 409):

> "The Act contemplates that the Commission need not accept the conditions contained in an application, Sunray Mid-Continent Oil Co. v. Federal Power Commission, supra; it likewise contemplates that the applicant need not accept conditions imposed by the Commission in its initial acceptance. Where conditions are imposed by the Commission the applicant has the free choice to accept or reject; to dedicate his property to public service or to refuse so to do; to submit to the jurisdiction of the Commission or to remain beyond the bounds of interstate commerce. This choice cannot be exercised by the applicant if the Commission says, in effect: 'Sell your gas; collect your proposed initial price; we will later tell you if you can keep your collections; if we decide you cannot, you must assure refund by bond.'"

The conflict between circuits is plain. The court below has told the Commission that every non-conditioned certificate may be construed—retroactively—as having contained, in fact, a "floorless" price condition.[9] Yet, the *Sunray* case holds such a condition to be invalid.[10]

In *Sunray* the court aptly described and properly voided the Commission's action taken before gas was committed to the interstate market and at a time when

---

[9] Compare the Commission's finding that the temporary certificates did "not require nor suggest a refund" (R. 10013).

[10] Since issuance of the *Sunray* opinion the Commission has ceased granting temporary certificates with "floorless" price conditions. When price has been a question it has attached definite conditions with a refund floor or reduced the price before service begins.

the producer may have had some freedom of choice (270 F.2d at 409-410):

> "... In the instant case no initial rate is accepted. None is rejected. The applicant is merely asked to speculate as to what the ultimate temporary rate may be, to rely on the ultimate fairness of the final determination, and to meanwhile dedicate its gas to public service. The action of the Commission is neither an acceptance, rejection nor proper conditional acceptance of Sunray's application. It merely purports to hold in abeyance potential conditions. Under such circumstances Sunray is denied its right to have the Commission act upon its application with such certainty as to allow the exercise of choice upon Sunray's part."

A brief analysis reveals that the lower court's decision does not even offer Petitioners the circumscribed choice held invalid in *Sunray*. At the time Petitioners committed their gas under the non-conditioned temporary certificates they had no inkling that they might be required to make any reparations.[11] They had been led to believe, before they committed their gas to the interstate market, that their collections under the non-conditioned temporary certificates were not subject to any condition for possible refunds (R. 9742, 10013-10014). At least, when the producer was tendered the

[11] Contrary to the implication in the footnote on page 16 of the court's opinion below (*infra*, p. 24a), Petitioners were not "relatively assured of being able to sell their gas without risk of subsequent refund at a price of 14.6 cents per Mcf." PSC and other intervenors did not urge 14.6 cents as a proper "in-line" price until after hearings had been completed and long after Petitioners had committed the sales under the non-conditioned certificates. Furthermore, the contentions of an adversary party, such as a private distribution utility, cannot be taken as an appropriate measure of the requirements of the public convenience and necessity.

invalid temporary certificate containing a "floorless" condition in the *Sunray* case, it was apprised of a possible, though indefinite, refund requirement.

Paraphrasing from the *Sunray* opinion, *supra*, the net effect of the decision below is to say to producers seeking temporary certificates at prices equal to or below the Commission's guideline price levels, "You may sell your gas at your contract rate. Since your price is within the guideline price for the area no condition for refunds is attached to your temporary certificates." Then, after the producers have committed their gas to the interstate sale on the authority of the non-conditioned temporary certificates, the Commission may, according to the court below, by a condition in the certificate order prescribing the terms and conditions of the sale for the future, retroactively revise the non-conditioned temporary certificates saying, "We have now decided that your past rates which were accepted for filing should be retroactively reduced."

Parenthetically, it should be noted that the 16.0-cent rate level collected by Petitioners under their non-conditioned temporary certificates has recently been determined by the Commission to be the price level at which permanent certificates will be issued in the area *Amerada Petroleum Corp., et al.*, Docket Nos. CI62-1544, *et al.*, Opinion No. 422 issued March 23, 1964.

The holding of the court below not only conflicts with the Tenth Circuit's determination that issuance of a temporary certificate with a "floorless" price condition is beyond the Commission's power but it also conflicts with the decision of the Court of Appeals for the Third Circuit in *Signal Oil and Gas Co.* v. *F.P.C.*, 238 F.2d 771, 773 (3rd Cir. 1956), *cert. denied*, 353 U.S.

923 (1957). In that case, like this, the Commission had issued a non-conditioned temporary certificate. Pursuant thereto deliveries began at the contract rate of 12 cents per Mcf. After hearing the Commission issued a certificate limiting the rate to be charged prospectively to 10 cents per Mcf. Upon review, Signal claimed that the Commission could not change the rate to be charged prospectively without a hearing under Section 5—the rate section of the Act. It argued that since the Commission had accepted the 12.0-cent rate for filing in connection with the non-conditioned temporary certificate, that rate became the legally effective rate which the Commission was powerless to change prospectively through the attachment of a condition in the permanent certificate.

In rejecting Signal's contention as to the Commission's power to limit the collection of future rates the court held (238 F.2d at 773):

> ". . . Signal makes much of the proposition that its rate filed at the time it asked for the emergency certificate has 'become invested with a compelling and decisive legal significance.' It says that this rate 'is the effective rate governing petitioner's sale. It is the only legal rate.' *This statement is true in so far as it means that no other rate could have been charged while the temporary certificate was in effect.* Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 1951, 341 U.S. 246, 71 S.Ct. 692, 95 L.Ed. 912. But it is quite another thing to say that by accepting the filing of the rate schedule when it granted the temporary certificate the Commission precluded itself from exercising any conditioning power it had under Section 7(e). Cf. Panhandle Eastern Pipe Line Co. v. F.P.C. 3 Cir., 1956, 232 F.2d 467, note 5; Alabama Tennessee Natural Gas Co. v. F.P.C. 3 Cir., 1953, 203 F.2d 494." [Emphasis supplied.]

Expressly recognizing that the Commission had no reparations power with respect to the legal rate on file and collected by Signal under its temporary certificate, the court limited the legal effectiveness of the 12-cent rate to the period of the temporary certificate. In contrast, if the rationale of the court below were to be applied, the filed rate collected under non-conditioned temporary certificates would not be the legal rate. Instead, some other rate might be charged—retroactively. Compare the holding of the court below with the holding of the Court of Appeals for the Fourth Circuit in *Hope Natural Gas Co.* v. *F.P.C.*, 196 F.2d 803 at 805 (1952) where the Fourth Circuit would not permit reparations for the benefit of the seller and forbade any deviation from the filed rate stating (196 F.2d at 805):

> "The Commission is given no power to enter reparations orders with respect to rates."

Plainly, the decision of the court below cannot stand side by side with the *Sunray*, *Signal*, and *Hope* opinions. The Court should grant certiorari to resolve this conflict.

3. Decision Below Presents a Question of Major Importance in Administration of the Natural Gas Act

If the court's decision below investing the Commission with reparations power were permitted to stand, the impact upon administration of the Natural Gas Act and the entire natural gas industry would be far-reaching. Long established Commission regulations and policies are founded upon the fact that the Natural Gas Act gives the Commission no reparations power. Indeed, a cornerstone of producer regulation—expeditious authorization of service under ascertainable con-

ditions—would be jeopardized. *Cf., F.P.C.* v. *Hunt*, No. 273, October Term 1963, decided March 30, 1964, slip opinion, pp. 12-13.

Not only would producers be subject to the uncertainty attendant with reparations, since the measure of such reparations must be essentially unknown at the time producers must decide whether or not to commit their gas, but also the Commission's whole area pricing policy is endangered. New projects such as that proposed by South Texas in these proceedings would be faced with an almost insuperable obstacle—extended delay in attachment of new supplies necessary to begin operations. Indeed, it is doubtful that the volumes of gas involved in the proceedings could have been marketed by South Texas in the absence of an ability under the temporary certificate procedure to attach new supplies without delay.

Early in producer regulation it became apparent that expeditious action on applications for certificates was essential in order that producers might be authorized to begin service without delay. Such action is essential not only to assure adequate supplies for consumers at the time such supplies are needed but also to give effect to the practical necessities of the production industry. Commission regulation through issuance of temporary certificates to independent producers has attempted to take cognizance of these needs while, at the same time, providing price protection through attachment of price conditions when appropriate.

Thus, when a producer files its application it has already executed a gas sales contract with a pipeline purchaser and, in most instances, stands ready to be-

gin service immediately. In fact, there are potent economic forces which require almost immediate Commission action. Recognizing that the public interest requires quick action on producer requests for temporary certificates the Commission adopted Section 157.28 to its Regulations which provides in part, as follows:

> "(e) As part of its application hereunder, or separately, the applicant independent producer must file or have on file (1) a statement of intention to invoke this section, setting forth the facts constituting the emergency requiring such action, which emergency may include, inter alia, drainage, threatened loss of lease, flaring, economic hardship resulting from payment of shut-in royalties, or similar situations; (2) a statement identifying the contract tendered as the rate schedule intended to be effective for the sale or transportation under this temporary authorization; and (3) a statement describing, generally, the facilities necessary to enable the purchaser to take delivery of the gas proposed to be sold or transported."

By the time a producer seeks a temporary certificate it has already invested substantial sums of money, as a lessee under its oil and gas lease, exploring for and developing the reserves (R. 1324-1334). Unless a producer can be assured of reasonably prompt commencement of deliveries, its investment may be jeopardized through drainage from adjacent properties. In other cases the producer may be faced with possible loss of its lease and consequent total loss of its investment if deliveries are not begun without delay. In instances where gas is produced in conjunction with oil the producer may be forced to flare its gas pending authorization to begin the sale. Further, the producer may be

obligated to make substantial shut-in royalty payments if deliveries are not begun by a certain date.

In the decade of producer regulation the Commission has issued many thousands of temporary certificates to meet and alleviate these emergency conditions. It has, however, attempted to fit this phase of its regulation into its overall scheme of administration of the Act. Thus, when the Commission issued its Statement of General Policy No. 61-1 announcing guideline prices at which it would certificate producer sales in the several producing areas throughout the country it stated [24 F.P.C. 818 (1960)]:

> "This statement establishing rate standards for independent producers of natural gas is issued on our own motion and is based on our experience gained after six years of regulation of independent producers under the Natural Gas Act. By this statement and the appended area price schedules we will set standards for initial and increased rate filings by producers for the sale of natural gas into interstate commerce. These standards will serve as a guide to us and to interested parties in determining whether proposed initial rates should be certificated without a price condition and whether proposed rate changes should be accepted or suspended.
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> * * * * *
>
> "* * * It is essential, particularly in the interest of the consumer for whose protection the statute was enacted, that means be found for making the most effective use possible of the Commission's limited facilities in discharging the new and additional duties called for by the regulation of producers of natural gas. In our opinion, the price standards established by this statement will aid in effectively applying the provisions of the Act to independent producers on a simple, clear and

administratively feasible basis, and in a manner fair to all whose interests are affected by Commission regulation. Our many reasons for establishing these maximum acceptable rates as opposed to establishing rates based on a full cost-rate base hearing for every rate filing made by producers are set forth at considerable length in our opinion No. 338, *Phillips Petroleum Co.*, Docket No. G-1148, et al., pp. 5 thru 12, issued on this date."

In keeping with the guideline prices, which have been revised by the Commission from time to time, temporary certificates requesting authorization to make sales at or below guideline levels are granted without price condition. If a proposed price should exceed the applicable guideline price the Commission attaches a price condition to the temporary certificate making the amounts collected in excess of the guideline price subject to possible refund. In some cases, when it appears that the proposed price might have an immediately disruptive effect upon the existing price structure in the area, the Commission may condition the temporary certificate to provide an initial rate no higher than the guideline price.

By use of the foregoing procedure all parties, seller, buyer, interested third parties, and consumers are apprised of their respective rights and obligations and enter into commitments or seek administrative relief with full knowledge thereof. The Commission is able to process thousands of applications with the rapidity that is necessary both to meet the emergency needs of the industry and to assure adequate supplies of gas at fair prices.

Utilization of guideline prices in issuance of temporary certificates is correlative to the Commission's at-

tempt to regulate producer rates on an area basis instead of an individual cost-of-service method. As this Court is aware, the Commission is striving to hammer out a workable method of producer regulation which will avoid individual cost-of-service determinations which the Commission has found to be administratively impracticable. *Wisconsin* v. *F.P.C.*, 373 U.S. 294, 298-299 (1963).

This Court has pointedly recognized this problem in *F.P.C.* v. *Hunt*, No. 273, October Term 1963, where it stated with regard to delays incident to issuance of certificates (slip opinion pp. 12-13):

> "The Commission has been making efforts in this regard, through the establishment of guidelines for determining initial prices and other administrative devices. 43 F.P.C. Ann.Rep. 13, 119-120 (1963). However, we again call to its attention the dangers inherent in the accumulation of a large backlog of cases with its accompanying irreparable injury to the parties. Moreover, consumers may become directly affected thereby through the reluctance of producers to enter interstate markets because of the long delay incident to permanent certification. Procedures must be worked out, not only to clear up this docket congestion, but also, to maintain a reasonably clear current docket so that hearings may be had without inordinate delay."

The lower court's reparations decision would strike at the heart of all that the Commission has been seeking to accomplish. It is obvious that if producers are going to be subjected to proof of "equitable factors" in order to avoid reparations, one essential element of such proof—adjudication of past rates—is a determination of costs. Negating a basic purpose of the Act

every certificate proceeding where reparations are possible will, of necessity, be converted into a cost-of-service rate case in order that rates collected under the temporary certificates may be properly adjudicated. *Atlantic Refining Co., et al.* v. *Public Service Commission of State of New York*, 360 U.S. 378, 390-391 (1959).

From the point of view of the regulated industry this novel reparations power would have extremely serious effects. Producers would be subjected to the possibility of heavy reparations despite the fact, as was true here, that their filed rates corresponded with or were less than the Commission's area guideline price. There would be no certainty as to how much of the revenues collected under non-conditioned temporary certificates would later become subject to reparation. Yet, numerous substantial costs incurred by producers during the pendency of the temporary certificates are based upon the filed rates.

For example, State taxes are imposed upon the basis of the effective filed rates. These taxes are collected and no effective means of recoupment is available if the Commission were retroactively to fix lower rates. Additionally, producers must make payments to numerous royalty owners on the basis of their filed rates and here again, the possibility of recoupment is remote. These factors are real considerations which would confront every producer. Development of many gas prospects would be indefinitely delayed to the ultimate detriment of consumers who are dependent upon continual development of new reserves. *F.P.C.* v. *Hunt*, *supra*, slip opinion pp. 12-13.

Moreover, the mere assertion of the power to order reparations in this case vitally affects Petitioners.

Revenues which had been considered definite and consequently have been committed elsewhere have suddenly become subject to refund even though they are beyond recall. And any hearings held to determine costs of producing the gas sold under the temporary certificates would necessarily be prolonged and expensive. Petitioners should not be required to assume the burden of these substantial expenses when it is clear that the Commission has no power to order reparations in any event.

The immediate impact of the decision of the court below both upon administration of the Natural Gas Act and upon parties affected thereby is clearly demonstrable. For example, the Commission has recently scheduled for hearing two cases involving many consolidated producer applications. See, *Sinclair Oil and Gas Co., et al.*, Docket Nos. G-16760, *et al.*, order issued March 25, 1964, and *H. L. Hawkins, et al.*, Docket Nos. G-18077, *et al.*, order issued March 30, 1964. Further, the Commission has held open the consolidated certificate proceedings in *Amerada Petroleum Corp., supra*, p. 17, for the express purpose of determining whether reparations should be ordered with respect to filed rates collected pursuant to non-conditioned temporary certificates. *Amerada Petroleum Corp., et al.*, Docket Nos. CI62-1544, *et al.*, Opinion No. 422, p. 21. In the *Hawkins* order, as in the *Amerada* opinion, the Commission noted that many of the producers had received non-conditioned temporary certificates. These additional hearings, to the extent they relate to the question of what, if any, reparations should be ordered, are a direct consequence of the lower court's holding that the Commission has reparations power.

There are numerous other producer sales currently being made pursuant to non-conditioned temporary certificates. If producers are now to be subject to reparations of amounts already collected without refund contingency, due process would dictate that they be permitted to present cost evidence to justify their filed rates. Necessarily, producer certificate cases will assume the nature of rate proceedings. A major objective of the Commission's area pricing approach will be defeated and administration of producer certificate procedures under Section 7 of the Act will be frustrated.

CONCLUSION

For the foregoing reasons, it is urged that this petition for a writ of certiorari be granted.

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APPENDIX A

Statute Involved

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regu-

lations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State Commission, or gas distributing company[18] or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect;[18] and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on

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[18] Subsection 4 (e) was amended May 21, 1962 by Public Law 87-454, 87th Congress, 2d Session [S. 1595], 76 Stat. 72.

motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 76 Stat. 72 (1962); 15 U.S.C. § 717c]

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Com-

mission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas. [52 Stat. 823 (1938); 15 U.S.C. § 717d]

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EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company; if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural

gas when to do so would impair its ability to render adequate service to its customers. [52 Stat. 824 (1938); 15 U. S. C. § 717f (a)]

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U. S. C. § 717f (b)]

(c) [2] No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings,

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[2] Subsection 7 (c) amended; (d), (e), (f) and (g) added February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H.R. 5249], 56 Stat. 83, 84.

if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U. S. C. § 717f (c)][3]

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[3] As originally enacted June 21, 1938 by Public Law No. 688, 75th Congress, Chapter 556, 3d Session [H.R. 6586], 52 Stat. 825, Section 7 (c) read as follows:

"(c). No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof: *Provided, however*, That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying

(d) [4] Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require. [56 Stat. 84 (1942); 15 U. S. C. § 717f (d)]

(e) [5] Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, opera-

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increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." (52 Stat. 825 (1938))

Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H.R. 5249], 56 Stat. 83, which amended Section 7 (e), effective February 7, 1942, was enacted after the Commission's decision *In the Matter of Kansas Pipe Line & Gas Company*, 2 F.P.C. 29.

[4], [5], [6] See footnote 2, p. 7.

tion, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U. S. C. § 717f (e)]

(f) [6] The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization. [56 Stat. 84 (1942); 15 U. S. C. § 717f (f)]

(g) [7] Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company. [56 Stat. 84 (1942); 15 U. S. C. § 717f (g)]

(h) [8] When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary

[7] See footnote 2, p. 7.

[8] Subsection 7 (h) was added July 25, 1947 by Public Law No. 245, 80th Congress, Chapter 333, 1st Session [H.R. 2956], 61 Stat. 459.

land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000. [61 Stat. 459 (1947); 15 U. S. C. § 717f (h)]

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17582

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
CONTINENTAL OIL COMPANY AND SUNRAY D X OIL COMPANY, SKELLY OIL COMPANY, SUN OIL COMPANY, GEORGE H. COATES, PRADO OIL & GAS COMPANY, PHILADELPHIA ELECTRIC COMPANY, INTERVENORS

No. 17627

CONTINENTAL OIL COMPANY AND SUNRAY D X OIL COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, AND LONG ISLAND LIGHTING COMPANY, INTERVENORS

No. 17628

THE UNITED GAS IMPROVEMENT COMPANY, AND LONG ISLAND LIGHTING COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT
SUN OIL COMPANY, SOUTH TEXAS NATURAL GAS GATHERING COMPANY, GEORGE H. COATES, SKELLY OIL COMPANY, CONTINENTAL OIL COMPANY, et al., PRADO OIL AND GAS COMPANY, AND PHILADELPHIA ELECTRIC COMPANY, INTERVENORS

No. 17859

PRADO OIL AND GAS COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, INTERVENOR

On Petitions to Review Orders of the Federal Power Commission

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Decided January 23, 1964

Opinion

Before FAHY, WASHINGTON and DANAHER, *Circuit Judges*.

FAHY, *Circuit Judge*: Continental Oil Co. and Sunray D X Oil Co., petitioners in No. 17627, and Prado Oil and Gas Co., petitioner in No. 17859, on May 15, 1959, and June 30, 1960, respectively, entered into contracts with the South Texas Natural Gas Gathering Company for the sale of natural gas at a price of 16 cents per Mcf. This was part of a larger project involving sales by numerous other gas producers in Texas Railroad District No. 4 to South Texas, to be delivered to Transcontinental Gas Pipe Line Corporation, for resale to interstate commerce. Applications for approval by the Federal Power Commission of sales of the petitioning producers were first filed between May 1959 and January 1960. However, even before notice of these applications had been issued *ex parte* temporary certificates had been granted to most of the producer-applicants authorizing the immediate commencement of the sales at contract prices ranging from 9 to 17 cents per Mcf. None of these certificates provided for any re-

fund should the contract prices subsequently be found to exceed the proper "in-line" price for the area.

After a hearing on the applications the Commission on November 22, 1960, approved the producers' proposed prices. The Public Service Commission of the State of New York, petitioner in No. 17582, sought a rehearing, contending that the proper "in-line" price for the particular area was 14.6 cents per Mcf. The Commission granted a rehearing and consolidated the above applications with thirty-five additional producer applications relating to the same project. Like the producers involved in the first stage of the proceedings these additional producer-applicants had been granted temporary operating certificates containing no refund provision. Hearings were once again held and on January 25, 1962, the Presiding Examiner issued his preliminary statement approving the proposed sales at prices ranging from 16 to 17 cents. In doing so he relied heavily on the Commission's Statement of General Policy No. 61-1, issued September 28, 1960, in which, as a part of its area pricing policy, the Commission had set the area price for Texas Railroad District No. 4, the origin of the gas, at 18 cents per Mcf.

On August 30, 1962, the Commission issued its own final decision in which it found that the "in-line" price for the area with respect to contracts entered into prior to September 28, 1960, was 15 cents per Mcf.[1] Accordingly, it approved the sales in question on the condition that the

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[1] Of eighty-six related applications originally involved in the Commission proceedings only fifteen proposed contract prices were found to be "out of line"; and of the twelve producers whose certificates were conditioned by the Commission on a price reduction all but three, Continental, Sunray and Prado, have apparently accepted the Commission's ruling by not filing a petition for review.

price charged be not in excess of 15 cents.[2] It refused, however, to order a refund of the charges in excess of 15 cents collected under the temporary authorizations. The Commission was initially of the opinion that since no refund provision had been included in the temporary certificates there was "no basis for ordering refunds." In its later order of December 18, 1962, denying reconsideration, the Commission explained that it would be inequitable to require refunds when the temporary certificates contained no provision clearly apprising the producers of the risk in operating under a temporary certificate subject to a refund obligation.

In its final orders the Commission also declared that the provisions in the sales contracts obligating the purchaser to take or pay for a minimum volume of gas on an annual basis were subject to the Commission's final order in a pending rule making proceeding concerning "take or pay" provisions. The Commission subsequently modified this condition so that the producers would not be required to file "take or pay" provisions for less than eight per cent of the annual contract quantities, regardless of the outcome of the rule making proceeding.

The producer petitioners in Nos. 17627 and 17859 seek review of the orders insofar as they condition approval of the proposed sales (a) on a reduction in the initial price to 15 cents and (b) on the outcome of the rule making proceedings regarding "take or pay" provisions. Petitioners in Nos. 17582 and 17628 seek review of the same orders insofar as they omit to require a refund of excess charges collected under the temporary certificates. Inter-

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[2] Simultaneously with this order the Commission issued its Fifth Amendment to Statement of General Policy No. 61-1 in which it reduced the area ceiling price level for Texas Railroad District No. 4 from 18 cents per Mcf. to 16 cents per Mcf.

venors in Nos. 17582 and 17628 support the Commission in refusing to order refunds.[3]

The Fixing of An In-Line Price of 15 Cents as a Condition to the Permanent Certificates

The Commission was obliged to be guided by *Atlantic Ref. Co.* v. *Public Serv. Comm'n.* 360 U.S. 378 (1959), known as the *Catco* decision. The Court there pointed out that some of the provisions of the Act regarding rates, notably Sections 4 and 5, entail extremely long delays, calling upon the Commission in Section 7 proceedings to condition certificates by requiring an "in-line" initial price. Accordingly, in granting permanent certificates the Commission is to decide the "in-line" price. This the Commission did in the present cases, fixing it as of the date of the contracts under which the gas was to enter interstate commerce. It determined that the appropriate price for District No. 4 revolved around the situation prevailing there in the years 1958, 1959 and 1960. It considered as the most important evidence a study prepared by the Commission staff analyzing contract and price data for the years 1955 and later. Of the contracts thus analyzed none executed during the 1958 to 1960 period and under permanent certificates involved prices above 18 cents and the majority, involving also the greater volume of gas, were at prices between 14 and 15 cents. And the Commission

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[3] In No. 17628 intervenor The South Texas Natural Gas Gathering Company refers to a statement in the brief of petitioners in that case regarding the absence of a provision in its certificate for a "flow-through" of refunds. South Texas states it would agree voluntarily to pass along refunds should they result from this review proceeding, on the condition that petitioners and other customers of Transcontinental Gas Pipe Line Corporation agree that such refunds will be immediately and completely passed along by them to the ultimate consumers so that petitioners and other customers of Transcontinental would not receive a windfall as the result of South Texas' action.

noted that it had granted certificates for sales in the area during the three years mentioned at prices ranging down to 6 cents per Mcf.[4] In addition, as the opinion points out, nearly all the contracts with prices above 15 cents were subject to litigation. Being under a cloud they were eliminated from consideration. The Commission also placed under the same cloud, or in a suspect category, other contract prices above 15 cents which, though not themselves in litigation, appeared because of the higher prices to be subject to the same infirmities as those which were. The Commission also gave less consideration to prices allowed under temporary certificates than under permanent certificates, because the former were issued ex parte and informally, without full investigation.

It cannot be seriously contended that the data upon which the Commission relied fails to support its determination of an "in-line" price of 15 cents. It is principally urged that the Commission erred in limiting, as above indicated, the evidence upon which it relied. We now consider these limitations.

As to the exclusion of prices under a cloud the Commission has the support of the opinions of the courts in *United Gas Improvement Co.* v. *FPC*, 283 F.2d 817, 824 (9th Cir. 1960), *cert. denied sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 365 U.S. 879, and *California Co.* v. *United Gas Improvement Co.*, 365 U.S. 881 (1961), and *United Gas Improvement Co.* v. *FPC*, 290 F.2d 133, 137 (5th Cir.), *cert. denied sub nom. Sun Oil Co.* v. *United*

[4] Continental contends this finds no support in the record. In its opinion on reconsideration the Commission adequately meets this objection by pointing out that the notice it took of prices ranging down to 6 cents "was not a part of the decisional process in determining the line but merely part of our explanation of the scope of the staff exhibit, which treated sales at prices of 14 cents and above. Therefore further evidence on this matter would not affect the basis of our decision."

Gas Improvement Co., 368 U.S. 823 (1961), and see our opinion in *Pub. Serv. Comm'n* v. *FPC*, 109 U.S. App. D.C. 292, 295 n. 3, 287 F.2d 146, 149 n 3 (1960), *cert. denied sub nom. Hope Natural Gas Co.* v. *Pub. Serv. Comm'n*, 365 U.S. 880, and *Shell Oil Co.* v. *Pub. Serv. Comm'n*, 365 U.S. 882 (1961). In the light of these authorities we do not sustain the challenge advanced on this ground. In any event the exclusion of the prices under a cloud does not undermine the validity of the "in-line" price determined by the Commission, considering the evidence in its entirety.

The producer-petitioners make special objection to the Commission's refusal to rely upon a number of sales at 16 to 17 cents made in 1955 and 1956 to the Coastal Transmission Corp. Since the Coastal sales were made before the 1958-to 1960 period when the contracts in the present cases were entered into and since the majority of the subsequent sales in Texas Railroad District No. 4 were at less than 15 cents, the Commission could reasonably determine as it did that the Coastal sales did not establish a valid line of 16 to 17 cents for that area during the 1958 to 1960 period.

The Commission also pointed out that "the earlier Coastal sales were made to a new company that had neither been given a certificate nor was yet in operation, so may have resulted in higher prices than would have resulted from contracts with an established pipeline." The Commission substantiated this observation on appeal by pointing out that the staff exhibit showed for the 1955-1956 period when the earlier Coastal sales were made that other sales, involving a greater volume of gas, were made to a more established pipeline at prices below 15 cents.

Continental contends that the Commission erred in not considering certain costs and financial requirements, evidence with respect to which was presented to show the amount Continental would be required to receive to recoup

its cash outlay with respect to one area of its production here involved, and in failing to consider evidence as to the industry's replacement costs of gas, submitted by Texaco[5] and adopted by the other producers. However, these are not rate cases of the type in which evidence of this kind ordinarily is considered relevant. These proceedings under Section 7, considered with the *Catco* decision, permit the Commission to fix the "in-line" price, not on a basis of cash outlay or replacement costs, but on the basis of the price level established by comparable sales contracted for by those placing gas in the area in interstate commerce. The standards of Sections 4 and 5 are not those to be used in conditioning a certificate issued under Section 7; otherwise the purpose of *Catco* to avoid the consequences of the well nigh interminable proceedings incident to a rate case would be defeated. See, for example, *United Gas Improvement Co.* v. *FPC*, *supra*, 283 F.2d at 828. Consideration of the proffered evidence was not essential. In so deciding we need not hold that the Commission may never consider such evidence if the circumstances in a particular case move it to do so consistently with its obligations under *Catco*.

Prado contends in No. 17859 that the Commission failed to give adequate consideration to its own Statement of General Policy No. 61-1, as amended, issued September 28, 1960. By this Statement the Commission prescribed guide line initial prices for twenty-three producing areas. It said that in doing so it considered many factors, including cost information from all decided and pending cases, existing and historical price structures, volumes of production, trends in production, et cetera. The guide line initial price for Texas Railroad District No. 4 was 18 cents per Mcf. Thereafter, on August 30, 1962, concurrently with its opinion in No. 362, presently before us,

[5] The contention in this regard is made by Prado as well as Continental.

the area initial price for said District was lowered to 16 cents per Mcf. Prado contends that the action of the Commission in conditioning the permanent certificates at a price level below either the 18 cents or 16 cents guide line price is arbitrary and discriminatory. But the area guide line price is only a guide line price; it is not an "in-line" price required by *Catco* to be determined with the issuance of permanent certificates under Section 7(c). As the Commission states, its Policy Statement was a guide to its future action and "cannot effect an automatic approval of proposed rates, particularly where the contracts were entered into before the Policy Statement." The Commission could not have ignored altogether its own Policy Statement, but was not required to be controlled thereby in deciding, in the Section 7 proceedings, that the in-line price should be fixed at a less amount on the basis of the evidence analyzed in its opinion.

A somewhat related contention is that the Commission erred in fixing the "in-line" price as of the date of the contracts rather than as of the later date of initial delivery of gas. The Commission answers that the execution of a contract is the significant act of a buyer and seller in determining price, and that the effect of this determination does not await deliveries. We think we must honor the discretion thus exercised by the Commission "to require that the gas be sold under contracts that were in-line as of the time they were executed," to adopt its language. The Commission cites *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956), to the effect that rates are established initially by the companies by contract or otherwise. The Commission apparently made no general rule for all cases, for it states that "under the circumstances here" the contract prices must be in line as of the time the contracts were executed.

None of the attacks on the "in-line" determination gives the court a basis for holding it to be invalid; and since

the data relied upon adequately supports the price condition of the permanent certificates such condition is approved. Contracts under permanent certificates at prices of not more than 15 cents, covering such a large volume of gas from the same area, and for the years which are most relevant, are so numerous that we cannot say that the Commission exceeded its authority in fixing the "in-line" price at 15 cents, notwithstanding its refusal to give significant consideration to higher prices for earlier years, even though under permanent certificates.

The Take-Or-Pay Provision

The original condition in this regard reads:

> The certificates of all of the producer applicants . . . shall be conditioned so that the take-or-pay requirement in each contract is subject to the provisions of our final order in Docket No. R-199 as of the effective date of that order.

As we have said, in its decision on reconsideration the Commission modified this provision to read that "the producers shall not be required to file take-or-pay provisions for less than 80 per cent of the annual contract quantities."

Docket No. R-199 is the general rule-making proceeding to consider standardization of take-or-pay provisions in producer contracts. Any modification of such contracts which might be required as a result of the proceeding would be prospective only. Should the producers here involved be required to file modified provisions they could then obtain review. See *Midwestern Gas Transmission Co.* v. *FPC*, 292 F.2d 119 (5th Cir. 1961). The present impact of the proceeding in Docket No. R-199 is too tenuous and uncertain to require the court to pass now upon the validity of what might eventuate, or to hold invalid pursuit of the matter by the Commission. To do

the latter would be to say that no modification of the questioned provisions can be validly accomplished. And to do this now would be to rule in the dark.[6]

The Refund Issue

Petitioners, Public Service Commission of New York, United Gas Improvement Company and Long Island Lighting Company, intervenors before the Commission, contend in Nos. 17582 and 17628 that the Commission is under legal obligation to require as a condition to its grant of permanent certificates that the producers refund that portion of the charges they have collected under temporary certificates in excess of the maximum initial price found by the Commission to be required by the public convenience and necessity.

We consider first the producers' contention that the issuance of the temporary certificates were appealable orders and that the failure of petitioners in Nos. 17582 and 17628 to seek review thereof precludes the relief they now seek, citing *Texaco, Inc.* v. *FPC*, 290 F.2d 149, 156-57 (5th Cir. 1961). But there the challenged conditions were in the temporary certificates. The Court held that if those conditions were deemed to be invalid the question should have been raised before the challenging producers accepted the certificates. "This is true because the failure of petitioners to appeal from the order granting the conditions within the time provided for appeals in Section 19(b) of the Natural Gas Act . . . deprives this court of jurisdiction to entertain a petition to review this order. Clearly, the

[6] Petitioners in No. 17627 attack the validity of the Commission's Fifth Amendment to its Statement of General Policy No. 61-1. However, in determining the validity of the orders under review we need not probe the validity of the Amendment; and there is no occasion now to pass upon the Amendment independently of those orders.

order granting the temporary certificates, when it embodied the conditions now complained of was an order which then aggrieved the petitioners." *Id.* at 156-57.

The situation here is significantly different. It is true the present petitioners in a loose sense may be said to have been aggrieved by the absence of a refund condition in the temporary certificates, for such a condition would have strengthened their position; but in a jurisdictional sense their aggrievement is with the absence of a refund requirement in the permanent certificates over which we now have jurisdiction. Once this absence became final before the Commission timely review was sought. In this situation we think it is open to petitioners to obtain now a decision on the refund issue.

Coming to the merits the producer intervenors say a refund condition is beyond the Commission's statutory power. As to this we may say initially that our statement in *Atlantic Ref. Co.* v. *FPC*, —— U.S. App. D.C. ——, 316 F.2d 677, 679 (1963), that there is no mechanism for refund of overcharges under Section 7 is not a holding that a refund may never be required when a permanent certificate takes over from a temporary one, an issue not there considered.

The producers argue that in any event refunds may not be required because the Commission lacks power "to set retroactive rates or award reparations," citing *Hope Natural Gas Co.* v. *FPC*, 134 F.2d 287, 309-10 (4th Cir. 1943), *rev'd on other grounds*, 320 U.S. 591 (1944). But there the Court was referring to the power of the Commission with respect to rates which had become unconditionally effective when filed, subject to being changed only prospectively in a proceeding under Sections 4 or 5(a) of the Act. The Court was not ruling upon the power of the Commission to condition a permanent certificate by requiring refunds of excessive prices charged and received

under temporary certificates.[7] We think it is clear that a refund can be required when the temporary certificate is so conditioned. The serious question is whether it can be required when the temporary certificate is not so conditioned.

As to this the Commission itself, though it did not require refunds in these cases, does not disclaim the power. The basic purpose of the Natural Gas Act is consumer protection from unreasonable prices, and refund of excessive utility rates is a well recognized remedy. It would need to be quite clear from the Act that the Commission lacked the power to use such a remedy for the courts to deny it. We find no such clarity. The power does not depend upon an explicit refund provision in a temporary certificate. Should the occasion be appropriate for its exercise the power resides in the Commission when it grants a permanent certificate. To hold that it may not then require refund of excessive prices previously permitted without notice or hearing or mature consideration, since the Commission acted on an emergent and temporary basis, would be inconsistent with the regulatory responsibility of the Commission to aid in the ascertainment and authorization of just and reasonable rates.

Section 7(e) provides, "The Commission shall have the power to attach to the issuance of the certificate . . . such reasonable terms and conditions as the public convenience and necessity may require." 56 Stat. 84 (1942), 15 U.S.C. § 717(f)(e) (1958). And the temporary certificates before us provide:

> This acceptance for filing shall not be construed as constituting approval of any rate, charge, classifi-

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[7] As to the power see *Texaco, Inc.* v. *FPC*, 290 F.2d 149, 156 (5th Cir. 1961); *Pure Oil Co.* v. *FPC*, 292 F.2d 350, 352-54 (7th Cir. 1961). Compare, however, *Sunray Mid-Continent Oil Co.* v. *FPC*, 270 F.2d 404 (10th Cir. 1959).

cation, or any rule, regulation or practice affecting such rate or service contained in the rate filing; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings or orders which may be made in the final disposition of this proceeding or any other findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company.

* * * * * * *

This constitutes all requisite temporary authorization to commence the sale of gas, but such authorization and acceptance of the rate schedule are without prejudice to such final disposition of the certificate application as the record may require and, furthermore, once service is commenced under this authorization it may not be discontinued without permission of the Commission issued pursuant to the provisions of the Natural Gas Act.

These provisions, all else aside, amply support authority for conditioning the permanent certificates by a refund requirement. As we have indicated, to order refund of rates found to be excessive is not an unusual remedy; and it is not unavailable under the Natural Gas Act due to the fact that in some instances the parties are not explicitly notified early in the proceedings that such a remedy may be imposed.[8]

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[8] The producers rely upon the Tenth Circuit's decision in *Sunray Mid-Continent Oil Co.* v. *FPC*, 270 F.2d 404 (1959). The Court there held that even in attaching a refund condition to a temporary certificate the Commission must limit it by setting a price at or below which the producer can sell without risk of a subsequent

The existence of the power, however, does not mean that its exercise is mandatory, as petitioners in Nos. 17582 and 17628 assert. Here we follow the standard adopted by the Commission, namely, the standard of equity—that is, the issue of a refund in the present circumstances turns upon equitable considerations. But we do not follow the Commission in holding also that the sole and decisive equitable consideration here is the absence of a refund requirement in the temporary certificates. That would amount to saying that in the absence of such a condition in the temporary certificates refunds may not be required, a position we cannot accept. We recognize the Commission's duty to consider the extent to which a refund obligation in the absence of prior warning will, by increasing the risk producers must bear, affect the quantity and continuity of the supply of gas and thus have an adverse effect on the interests of consumers. But there are public interest factors of equity which must be weighed along with the effect of mere absence of a refund condition in the temporary certificates. One of these is the very fact that excessive prices were obtained while the proceedings pended, and after it wa sknown an "in-line" price above 14.6 cents was being protested. See note 8 *infra*. The public interest, as represented by the consumer interest, is not necessarily, or

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refund order. The Court felt that without such a limit on the refund obligation the Commission's grant of temporary authority was too vague to allow the producer to decide intelligently whether to accept the Commission's conditional grant and thereby commit its gas reserves to interstate commerce.

To the extent that our decision may be inconsistent with *Sunray* we are constrained respectfully to disagree with the latter. Moreover, it should also be pointed out that as a practical matter the producers in this case were relatively assured of being able to sell their gas without risk of subsequent refund at a price of 14.6 cents per Mcf., the price which PSC and the other consumer interests originally urged as the proper in-line price.

entirely, offset by the absence of an explicit refund condition in the temporary certificates, especially when those certificates contained the general conditions to which we have hereinabove referred. We do not attempt an enumeration of all equitable considerations involved. These are better left for at least initial Commission consideration in all the circumstances. We do hold, however, that the mere absence of the condition in the temporary certificates is insufficient to cast the full burden of excessive charges upon the consuming interests. There must be, with the assistance of the parties, a broader and more penetrating analysis and consideration of the factors pro and con a refund, and its amount or extent, in arriving at an equitable conclusion.

The refund issue requires further development and fuller consideration of the equitable factors other than those thought to flow from the mere absence of an explicit refund condition in the temporary certificates.

Nos. 17627 and 17859 affirmed.

Nos. 17382 and 17628 remanded for further proceedings consistent with this opinion.

APPENDIX B

Docket Nos. G-18638, *et al.*

Opinion No. 382

OPINION AND ORDER ISSUING CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY

(Issued August 30, 1962)

SWIDLER, Chairman:

This proceeding, arising under Sections 7(c) and 7(e) of the Natural Gas Act, involves applications for certificates of public convenience and necessity for the sale of gas by a group of producers in Texas Railroad District No. 4, located in the southern tip of Texas. The producers propose to sell gas at various prices up to 18 cents per Mcf to South Texas Natural Gas Gathering Company, which, in turn requests certificate authorization to build additional facilities and to sell the gas at 20 cents per Mcf to Transcontinental Gas Pipe Line Corporation (Transco), also an applicant with respect to certain facilities. The Duval County Joint Venture, composed of Coastal States Gas Producing Company and Southern Coast Corporation, proposes to purchase additional gas at about 12 cents per Mcf and sell it to South Texas at 15 cents per Mcf. Some of these proceedings are before us for the second time after we granted rehearing of our order of November 22, 1960, in *Texaco, Inc.*, 24 FPC 979, where we issued certificates to Transco, South Texas, and a number of producers in the first phase of the contemplated expansion. After the second hearing the proceedings are before us upon exceptions to the examiner's decision issued January 25, 1962. The principal issues are whether the producer prices are proper, whether South Texas and the Joint Venture are pipeline companies within the meaning of the Commission's Regulations, and whether the 20-cent rate of South Texas to Transco and the 15 cent rate of the Joint Venture to South Texas are justified.

By contract of February 17, 1959, Transco was to purchase from South Texas at least 50,000 Mcf of gas per day at 14.65 psia and was to have the right to take up to 70,000 Mcf of gas per day (known as the first phase). On the first and second anniversaries of first delivery the daily contract minimum and maximum quantities were to be increased each year by an additional 50,000 Mcf per day and 70,000 Mcf per day (known as the second and third phases). The contract provides for an initial price of 20 cents per Mcf, to be increased one cent each 5 years from the date of first delivery. Transco has agreed to reimburse South Texas for three-fourths of any new or additional production or severance taxes, if such are levied, during the term of the agreement.

In its application Transco sought a certificate authorizing the construction of a pipeline 28.9 miles long extending from a connection with South Texas at a point in La Salle County, Texas, to a point on Transco's 24-inch line at the Tilden ga treating plant in McMullen County, Texas, and an additional compressor station. These facilities have been constructed under a temporary certificate, and Transco has been purchasing gas under the first phase since December 12, 1959 and under the second phase since February 14, 1961. As in the earlier hearings no opposition was expressed to Transco's proposal, although the Public Service Commission of New York (PSC) requested a finding that there have been no claims that Transco's favored-nation contract clauses have been "triggered". The examiner concluded as did the Commission in the previous proceeding (24 FPC 979, 984-985) that a finding with respect to triggering was not necessary. As stated in the prior order, Transco showed that it would be unwilling to pay a higher price even if triggering were not a factor and while this left the seller with the contractual option to terminate, the seller could not do so without abandonment proceedings before this Commission.

As stated in our prior order, "Transco's connection with South Texas has been constructed under a temporary certificate, and Transco has been purchasing gas since December 12, 1959. There is no issue raised with respect to the engineering, financial or economic feasibility of Transco's project or the need of its markets for gas."

South Texas, which is a wholly-owned subsidiary of Coastal States Gas Producing Company, previously owned and operated a natural gas system consisting of approximately 108 miles of pipeline extending north from the Rio Grande to a point in Jim Wells County. On July 2, 1959, under the "producer" regulations, South Texas filed its present application. The facilities were to consist of 195 miles of pipeline extending from South Texas' existing line in Brooks County to the point of interconnection with Transco in La Salle County, lateral lines in Zapata, Hidalgo, Starr and Webb Counties, gathering lines in various fields, and a compressor station. South Texas has constructed the facilities and is delivering gas to Transco under a temporary certificate. No question has been raised in the exceptions as to the engineering, financial or economic feasibility of the project.

Joint Venture owns about 100 miles of gathering lines in Duval and Webb Counties, Texas, and South Texas operates these lines for the transportation and delivery of gas destined for Transco.

The producer applications here seek certificate authorization to sell gas to South Texas. Certain of the applications for certificates were previously granted by the Commission; the remaining are additional and were filed in connection with amendments to South Texas' and Joint Venture's "original applications" to implement Transco's second phase quantity deliveries.[1] By order of May 11,

[1] On February 14, 1961, the Commission granted South Texas temporary authorization to sell the second phase increment.

1961, the Commission severed the applications of 52 producer applicants involved in the prior hearing. Their proposed prices were 14.5 cents per Mcf or less, and no controversy remained with respect to granting these applications.

In its first order of November 22, 1960, 24 FPC 979, the Commission found that the prices proposed by the producer applicants, ranging from 9 cents to 17 cents per Mcf at 14.65 psia, were "in line". The Commission was unable to determine whether the price spreads as proposed by South Texas and the Joint Venture were consistent with the public convenience and necessity but, in order to protect the consumers, required that the certificates issued to them be conditioned so as to require that, two years after the start of deliveries on December 12, 1959, these companies file cost of service studies acceptable to the Commission, accompanied by revised rate schedules, if necessary, reflecting such cost of service studies.

Upon application for rehearing by PSC, which argued that the prices used by the Commission were not comparable or were involved in litigation, the Commission granted rehearing. A second hearing was held from May 16, 1961, to June 26, 1961. Briefs were filed and the examiner issued his decision on January 25, 1962. In his decision he found that South Texas, but not the Joint Venture, should be classified as a pipeline. He determined that the cost of evidence in the record submitted by South Texas and the Joint Venture did not meet the requirements of the Commission's order of November 22, 1960, and required that cost of service evidence be submitted by both South Texas and the Joint Venture as called for by the Commission's prior order. He issued certificates to Transco, South Texas, the participants in the Joint Venture and the producers. He conditioned the certificate to South Texas so as to require refunds if the cost data to be filed showed the initial rate was excessive (but only amounts collected above

18 cents); with one exception[2] he did not condition the certificates issued the Joint Venture or the producers as to price because the proposed prices were below the current Texas District No. 4 area price of 18 cents. Exceptions to the examiner's decision were filed by PSC, Transco, Jake L. Hamon, Joint Venture, South Texas, a group of Eastern Interveners,[3] and our staff.

Although rehearing had been granted with respect to the 1960 order, South Texas and the Joint Venture submitted cost of service data on February 1, and 12, 1962, respectively. Meanwhile, on November 20, 1961, an application in Docket No. CP62-124 was filed by South Texas representing the third phase increase in the company's deliveries to Transco that would include an additional line in Hidalgo, Starr and Zapata Counties and would increase the minimum to 150,000 Mcf per day and the maximum to 210,000 Mcf per day. A permanent certificate was issued to South Texas in this docket on February 7, 1962, but conditioned so as to require that South Texas reduce its rate to Transco and make refund if this should be required by the principles employed by the Commission in these proceedings (Docket No. G-18907).

Producer Prices and Other Producer Issues

Basic here are the proper prices to be allowed the producers selling gas to South Texas and the Joint Venture. The proposed contract prices before us range from 14.7 cents to 18 cents at 14.65 psia as follows: one at 14.7 cents,

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[2] Jake L. Hamon, whose 18 cent price in Docket No. CI61-922, he said, was reached without arm's-length negotiations.

[3] Long Island Lighting Company, Philadelphia Electric Company, Public Service Electric and Gas Company and The United Gas Improvement Company.

12 at 15 cents, 12 at 16 cents, one at 16.50 cents,[4] one at 16.4965 cents,[5] 4 at 17 cents, and one at 18 cents (for Jake L. Hamon in Docket No. CI61-922). The examiner did not recommend the imposition of a price condition with respect to the producer prices except for Hamon, whose 18-cent price he would reduce to 16.5 cents for lack of arm's-length bargaining. The examiner cited the Policy Statement[6] as authority, noted that the Commission's area price standards were promulgated after due consideration, and referred to the staff's exhibits as showing an existing price level in the 16-17 cent range.

PSC excepts to the examiner's conclusions, requests the Commission to authorize producer sales at no higher than 14.6 cents per Mcf and asks that a corresponding reduction be made in charges of South Texas to Transco. PSC contends that the Policy Statement should not be involved in contested proceedings as an automatic determinant and that initial prices above 14.6 cents would be out-of-line and unlawful. The basis of PSC's contention is that most of the prices in District 4 above 14.6 cents are either involved in litigation[7] or were authorized for purchase by Coastal Transmission Corporation in connection with a single pre-*CATCO*[8] 1956 certificate decision, *Houston Texas Gas and Oil Corp.*, 16 FPC 118 (December 28, 1956).[9]

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[4] This is the Mokeen Oil Company price in Docket No. CI60-789 composed of a base price of 16.25 cents plus a dehydration allowance of .25 cents.

[5] This is the Texaco price in Docket No. CI61-961 at a base price of 15.2 cents increased to 16.4965 by reimbursements including a .25 cent dehydration allowance.

[6] Statement of General Policy No. 61-1, issued September 28, 1960, 24 FPC 818.

[7] *PSC* v. *FPC*, 295 F.2d 140, certiorari denied 368 U.S. 948.

[8] *Atlantic Refining Co.* v. *FPC*, 360 U.S. 378.

[9] Affirmed as *Florida Economic Advisory Council* v. *FPC*, 251 F.2d 643 (CADC), certiorari denied 356 U.S. 959.

The Eastern Interveners in their exceptions take a similar position. They point out that in the order on rehearing in *Coastal Transmission Corporation*, Docket No. G-18338, issued November 2, 1961, the Commission rejected contentions that under the Policy Statement it must issue permanent unconditioned certificates where the contract rates do not exceed the ceiling. They also point out that as in *CATCO* this proceeding involves contracts executed before the issuance of the Policy Statement so that the Commission must determine the "in line" price for the contracts at the time of their execution. They concluded that a price line of no more than 14.6 cents should be established for the area.

The only producer filing exceptions on prices was Hamon, who contends that if the Policy Statement is to be effective, a producer should be able in good faith to rely on the prices set forth in the Statement—at least until lawfully superseded. Other producers in their briefs took a position different from PSC and the Eastern Interveners. Texaco contended that its proposed 16.4965 cent price was not out of line and because it was below the 18-cent ceiling, it was entitled to an unconditioned permanent certificate. On the basis of the Policy Statement it further contended that producer regulation should be based on the reasonable financial requirements of the industry and discussed its financial evidence and the need for developing gas supplies. Continental also presented financial evidence, contended that the Policy Statement means that the Commission intends to certificate prices up to the announced guide levels without condition in the absence of compelling evidence to the contrary, and concluded that on the basis of the staff's evidence the proposed prices were in line, apparently relying on the earlier Coastal prices. Other producers, including Skelly, variously contended that the proposed prices should be certificated because they were below the Policy Statement ceiling, were "in line", were at arms-length, would not "trigger" other increases and were otherwise justified.

As in other cases our principal guide to the determination of a proper initial price for the producers is the Supreme Court's Opinion in the *CATCO* case. There the Court made it clear that we were not required to determine "just and reasonable" rates, but were required to scrutinize the proposed initial prices to determine whether they were supported by evidence showing them to be required by the present or future public convenience and necessity. The Court said that where "the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicants' existing rates by reason of 'favored nation' clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary".[10]

An important consideration in making our findings in this proceeding is the effect to be given our Statement of General Policy No. 61-1. This Statement was issued September 28, 1960 to assist in meeting the practical problems of regulating the prices of the independent producers pending competition of the various area rate proceedings. It sets forth price levels applicable to various areas in determining whether certificates for new sales should be conditioned upon acceptance of a lower price and increased rate filings should be suspended. The area price ceiling for Texas District No. 4, where the producer sales in this proceeding are made, was set at 18 cents per Mcf for initial service and 14 cents per Mcf for increased rates, both at 14.65 psia. However, as the language of the Policy Statement makes clear, the area ceilings are guidelines to future Commission action.[11] Our Policy Statement cannot effect an automatic approval of proposed rates, particularly where the contracts were entered into before the Policy State-

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[10] 360 U.S. at P. 391.

[11] See the *Phillips* case, *Wisconsin v. FPC*, ... F.2d ... (CADC. November 30, 1961), certiorari granted 369 U.S. 870.

ment.[12] We made this clear in *Coastal Transmission Corporation*, —— FPC ——, Docket No. G-18338, order of November 2, 1961, where we said:

> In their applications for rehearing, Baker, Superior, and Phillips contend that by not issuing unconditioned permanent certificates in those dockets in which their contract rates are at or below the appropriate area price guides set forth in Statement of General Policy No. 61-1, cited *supra*, we are in effect modifying if not repudiating our Policy Statement.
>
> Our actions here do not repudiate the Policy Statement. The price guides for initial service contained in the statement in effect constitute ceilings at which a proposed initial sale will, in the absence of otherwise compelling evidence, be certificated. The price guides do not constitute a floor to be used to raise proposed initial prices to the highest levels abstractly permissible thereunder. Obviously circumstances may exist which would compel the submission of evidence by the producer in support of rates at or below the appropriate area levels. Such circumstances we believe are present herein. For example, the challenge made to these producers' proposed initial prices coupled with the complete lack of any record by which to test the propriety of the initial prices proposed. Consequently, the deferral of final certification herein is in full accord and harmony with the tenor and explicit provisions of our Policy Statement.

Following the Supreme Court Opinion in *CATCO* we must determine the appropriate price "line" for District No. 4. This line should be determined as of the time the

[12] Of course, we are discussing here only the area ceilings promulgated in the Policy Statement without hearing. The effect to be given to area prices developed upon a record in an area proceeding is a different question.

contracts were made,[13] so that we should properly put greater emphasis on the calendar years 1958, 1959, and 1960. The most important evidence available for determining the price line is a study prepared by our staff (Exhibit 24) showing the provisions of contracts in District No. 4 dated 1955 and later. Because proceedings related to lower priced sales were severed and certificates have already been granted for them, the study shows only contracts at prices of 14 cents per Mcf and higher. However, we may take notice that we have granted certificates for sales in District No. 4 during the three years in question at prices ranging down to 6 cents per Mcf, usually for small volumes.

Tabulating the staff's evidence with respect to the three years 1958-1960 we find the producer contracts and estimated first month's deliveries distributed among the initial price categories as follows:

[13] *See Continental Oil Company, et al., CATCO . . . FPC . . .* Opinion No. 351, Docket No. G-11024, *et al.*, issued January 22, 1962.

Price	No. of Contracts Under Permanent Certificates [a]	Estimated First Month Volumes	No. of Contracts Under Temporary Certificates [b]	Estimated First Month Volumes
		(Mcf)		(Mcf)
14	26-(1)	1,289,600 [c]	7-(4)	365,800
14.25			1	5,053
14.4	1	7,500		
14.5	16-(1)	1,214,625 [d]	2-(1)	180,000
14.6	2	166,000	2-(2)	86,350
14.8	2	80,550	2-(1)	102,000
15.0	1	116,370	3-(2)	133,710
15.5			1-(1)	45,000
16.0	12-(11)	480,620	6-(2)	1,086,000
16.5	7-(7)	233,250	2	193,080
17.0	4-(3)	494,500	1-(1)	12,371
17.24			17-(1)	1,691,624
18.0	5-(5)	867,810	7	970,920
18.23			6	535,565

[a] The parenthetical numbers in the various price categories for permanent certificates represent those of the total shown challenged and on remand in *PSC* v. *FPC*, 295 F.2d 140 (CADC, June 15, 1961) some of which have been changed to temporary certificates in *Coastal Transmission Co.*, ... FPC ..., Docket No. G-18338, November 2, 1961, and in *Hassie Hunt, Operator, et al.*, Docket No. G-19115, November 2, 1961.

[b] In the column for temporary certificates, the parenthetical number indicates those of the total shown subsequently made permanent at the indicated prices. Of the five temporary certificates made permanent at prices above 15 cents three were permanently certificated *prior* to remand in *PSC* v. *FPC*, *supra*. McWood Corporation with a price of 15.5 cents was granted a certificate on August 7, 1961, in Docket No. C161-259. *Coastal States Producing Company*, with a price of 16 cents was granted a certificate on May 1, 1962, in Docket No. G-20127. This sale, while comparatively large in amount (450,000 Mcf for the first month), related to surplus gas originally to be delivered only for a six-month period.

[c] This total includes three separate monthly estimated deliveries of 180,000 Mcf each and two of 90,000 Mcf.

[d] This total includes separate monthly estimated deliveries of 150,000, 280,500, and 213,500 Mcf.

Several conclusions can readily be drawn from an inspection of the above figures and the evidence itself. Looking at the permanent certificates it appears that almost all contracts above the 15-cent level were the subject of litigation.[14] Specifically, the Commission's orders[15] granting certificates were remanded in *P.S.C.* v. *F.P.C.*, 295 F. 2d 140 (CADC, June 15, 1961) certiorari denied 368 U.S. 948 where the court found that the Commission had erred in failing to permit PSC to intervene. While the Court did not determine what the proper level of the rates should have been, nevertheless the rates involved in this court proceeding must be considered under a "cloud" for the purpose of using them to establish a price "line", for it was the purpose of PSC, in petitioning for intervention, to oppose the granting of certificates at those prices. *United Gas Improvement Co.* v. *F.P.C.*, 283 F. 2d 817 (CA9), certiorari denied 365 U.S. 881.[16] In that case the

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[14] One at 17.0 cents, not subject to litigation is the large sale (480,000 Mcf in the first month) by *Valley Gas Transmission Inc.* in Docket No. G-19618. This is a gathering company sale and is not comparable to sales by producers, for Valley purchases all the gas which it sells. In this docket it was given a certificate (25 FPC 233) to sell gas to Tennessee Gas Transmission Co. in District No. 4 at 17 cents, which it would purchase from various producers at 14 cents. The other at 16.00 cents is a small producer sale (15,500 Mcf in the first month) by *V. F. Neuhaus* in Docket No. G-18862.

[15] *Texas Illinois Natural Gas Pipeline Company, et al.*, Docket No. G-14829, *et al.*, intervention denied March 26, 1959, certificates issued 22 FPC 979, Dec. 1, 1959; *Peoples Gulf Coast Natural Gas Pipeline, et al.*, Docket No. G-19086, intervention denied March 21, 1960, certificates issued 24 FPC 1, 106, July 29, 1960; *Coastal Transmission Corp., et al.*, Docket No. G-18338, *et al.*, intervention denied March 3, 1960, certificates issued in *The Ohio Oil Co., et al.*, Docket No. G-17896, *et al.*, September 19, 1960.

[16] See also *United Gas Improvement Co.* v. *FPC*, 290 F.2d 133 (CA5), certiorari denied, 368 U.S. 823.

Court said that when "an order certificating an initial rate is under court or Commission review" it "does not provide a reasonably reliable basis upon which to predicate a price line" Even where the review concerns only the right to intervene, prices subject to such review "ought not to be considered in fixing a price line." Thus we must eliminate from the discussion the prices involved in the *P.S.C.* v. *F.P.C.* remand. With one minor exception,[17] this leaves no produced prices under permanent certificate above 15 cents at the time the record was closed in this proceeding as shown by the second column of the table

The table above also shows prices under temporary certificates ranging from 14 cents to 18.23 cents, including a few that have subsequently been made permanent;[18] and staff's evidence, but not the table, also sets forth prices under permanent certificates for the years 1955, 1956 and 1957 relating to sales at 16 to 17 cents to Coastal Transmission Corporation. Both groups of prices fall under a corollary principle stated by the court in the *U.G.I.* case, supra (283 F. 2d at P. 824), as follows:

> We go further and express the view that where a substantial number of certificated prices are thus under court or Commission review, like prices in the same area though not currently under review ought to be regarded as suspect. In such circumstances it would seem that such similar prices ought not to be relied upon in fixing a line except upon evidence and findings to the effect that they are not subject to the same infirmities which are under test in the pending proceedings.

The prices under temporary certificates fall into approximately the same price categories as those subject to review

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[17] See footnote 14.

[18] See footnote b in table.

and thus under the court's reasoning must be regarded as suspect. The applicants have not shown that the prices under temporary certificates [19] are not subject to the same infirmities as those which are under test in the *Skelly* proceeding pending before us. Specifically, no attempt has been made to show that these suspect like prices were themselves "in line" at the time they were made. Furthermore, we do not think that prices under temporary certificates are as persuasive as the prices under permanent certificates, because temporary certificates are issued informally, *ex parte* and necessarily without time for full investigation. The granting of temporary certificates is a summary matter to meet an emergency. *American Liberty Oil Co.* v. *F.P.C.*, 301 F. 2d 15 (CA5, March 30, 1962), No. 18827; *Huber Corporation* v. *F.P.C.*, 294 F. 2d 568 (CA3, 1961).

Likewise, the record does not show that the Coastal 1956-1957 sales were not subject to the same infirmities as those in the present proceeding. There is no showing that these earlier prices, which were markedly higher than any jurisdictional sales ever made in Texas District No. 4, established a valid new line for sales to established pipelines in the District.[20] On the contrary, as the table shows in the

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[19] Including those subsequently made permanent.

[20] The earlier Coastal sales were made to a new company that had neither been given a certificate nor was yet in operation, so may have resulted in higher prices than would have resulted from contracts with an established pipeline. Moreover, the Eastern Seaboard interveners were excluded from the hearing for reasons subsequent court decisions have shown were invalid, and the New York Commission's protest to the high rates as "out of line" were rejected by the Commission on the basis that the record did not show in effect whether they were in line or not (apparently on the erroneous assumption that this was a burden for the interveners rather than the applicants to meet). *See Houston Texas Gas & Oil Corp., et al.*, 16 FPC 118, 141-142, 17 FPC 303, 310.

succeeding three years the great majority of sales (including almost all not procedurally defective) were at less than 15 cents.

Returning to the evidence summarized in the table, we may note that there are a number of contracts involving substantial volumes of gas at the 14.0 cent and 14.5 cent price levels not subject to litigation. While the evidence shows only two contracts at 14.6 cents, two at 14.8 cents and one at 15 cents, certain of the temporary certificates at these levels have subsequently been made permanent in other proceedings so that there result 4 contracts at 14.6 cents with estimated volumes of 252,350 Mcf in the first month, 3 contracts at 14.8 cents with volumes of 120,550 Mcf and 3 contracts at 15.0 cents with volumes of 238,080 Mcf. As can be seen, there is but one contract relating to a moderate volume at 15.5 cents. The record shows that while the volumes vary among the individual contracts, the proposed sales are not of such high volumes that they are not comparable to these already certificated, nonlitigated sales at 15 cents or below. Based upon the evidence we conclude that the price line prior to September 28, 1960 was 15 cents per Mcf and that any price above this level is out-of-line.

As already indicated Texaco and Continental have introduced additional economic and financial evidence to justify their proposed prices of 16.4965 cents and 16 cents respectively. Texaco's evidence is designed to show the replacement cost of the gas which it sells. It presents industry-wide cost trends and also data on the costs of replacing gas consumed for the United States as a whole and for the Texas Gulf Coast area, using a variety of statistical sources and employing a number of estimates based on judgment. To some extent the results depend on the future demand for gas, for Texaco introduces a factor so as to include not only the cost of replacing the present gas consumed but also additional gas necessary to meet future needs. Thus under Texaco's theory the present consumer would,

in effect, be burdened not only with the cost of the already-discovered gas he now consumes, plus at least some of the cost of replacing it, but also with costs associated with the discovery of additional volumes of gas based upon future demand trends. From the country-wide and area-wide data Texaco then attempts to draw similar conclusions with respect to its own financial needs by comparing its exploration and drilling costs with the industry figures.

In support of its presentation Texaco quotes the *Phillips* case [21] which states in effect that our ultimate objective will be the determination of fair prices for gas based on the reasonable financial requirements of the industry. It argues that by "reasonable financial requirements" we mean the revenues required by the producing industry from sales of natural gas in order to provide funds sufficient to search for, develop and produce gas supplies adequate to meet the continuing demands of the public for gas. In our opinion these observations and Texaco's evidence are not germane to this certificate proceeding. The principal criterion that should be employed here is whether the proposed prices were "in line" at the time of contract execution as required by the Supreme Court's *CATCO* opinion.[22] Texaco's observations and evidence may have an important bearing on determinations to be reached in an area rate proceeding, or might be relevant in an individual company rate case although they fall short of showing Texaco's costs. However, we do not think it necessary or appropriate in a certificate proceeding to consider evidence of area costs or financial requirements, or of individual company costs or financial requirements. Any such approach is of limited utility [23] and leads to complicated, long-drawn-out proceedings, detrimental to the public.

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[21] 24 FPC 537, 547.

[22] *Atlantic Refining Co.* v. *PSC*, 360 U.S. 378.

[23] See *Continental Oil Co., et al.*, ... FPC ..., Opinion No. 251, Docket No. G-11024, *et al.*, issued January 22, 1962.

Questions concerning the cost of replacing present reserves, and more particularly whether such costs should be borne by present customers or by venture capital are not questions to be decided in a section 7 certificate proceeding. Rather, they are central questions to be decided in area rate proceedings.

We therefore hold that cost of service and financial requirements evidence normally is not relevant in producer certificate cases and that the initial price in such proceedings shall be determined by the "in line" price in the area at the time the producer contract in issue was executed and by our guideline ceiling price for the area. We do not mean to foreclose the possibility that a producer may present compelling circumstances in a particular proceeding to justify a higher price, but we wish to emphasize that with the guidelines herein established the price issue in certificate cases should be handled expeditiously and that before any evidence which would customarily be presented in establishing a just and reasonable rate can be admitted in evidence, a convincing showing must be made that such evidence is essential to the just disposition of the price question.

Obviously, we cannot permit every individual certificate case to be converted into a full-blown rate case; the proof in this proceeding demonstrates the lack of utility of a limited cost of service presentation. The evidence does not show the cost of present reserves and consequently does not indicate the price necessary to cover such costs and provide a return which will attract sufficient risk capital to undertake the exploration and development necessary to replace present gas reserves.[24] More generally, the

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[24] Compare *Panhandle Eastern Pipe Line Co.* v. *FPC*, ... F.2d ..., (CADC, June 30, 1962) No. 16583 where in a rate case the court upheld the Commission in refusing to base rates on field prices or hypothetical development costs.

evidence does not demonstrate the "financial requirements" of Texaco or the other producers in this proceeding, for the relation of individual needs to those of the industry in the country as a whole or in the area is not shown by the limited comparisons made. To correct those defects would require a complete rate case, which we have found not warranted in a certificate proceeding.

Continental strives to support its 16 cent price in the Javelina Field by reference to its evidence showing that from 1946 to 1963 it would spend more than twice as much as it had realized or would realize. In fact, it said it would have to receive $2.78 per Mcf in order to recoup its cash outlay. Apart from the question of the type of evidence appropriate in a certificate proceeding such narrowly limited cost data would not form a proper basis for appraising financial requirements. *See Socony Mobil Oil Company*, —— FPC ——, Docket No. G-13780, February 9, 1962.

Therefore with respect to all of the producer prices contained in contracts entered into prior to September 28, 1960, the date of issuance of the Commission's Statement of General Policy No. 61-1, we conclude that the "in-line" price was 15 cents per Mcf, including all reimbursements and charges, and that certification of all prices above this rate are not in the public interest and would not serve the public convenience and necessity.

While we shall therefore condition the certificates of the producers having such contracts upon their acceptance of the 15 cent in-line price, we do not believe we should also do so with respect to the four contracts in issue here which were entered into after September 28, 1960, at prices at or below the 18 cents per Mcf established as the guideline price for Texas Railroad District No. 4 in the State-

ment of General Policy.[25] For the record in this case does not focus upon the effect, if any, which should be given to the prior establishment of the 18-cent area ceiling upon the determination of the appropriate price at which we should issue permanent certificates for these contracts. And we take judicial notice of the fact that at least 21 other temporary certificates (and one permanent certificate) have been issued without price condition for sales in Texas Railroad District No. 4 contracted for since the issuance of the policy statement at prices between 15 cents and 18 cents per Mcf. Moreover, the contract dates for some of these certificates precede the contract dates of the four post-policy-statement temporary certificates in issue here.

In our opinion, therefore, it would not be in the public interest to issue permanent certificates requiring those producers whose applications for certificates for sales, contracted for at prices at or below the ceiling which had previously been set in the policy statement, happened to have been consolidated in this proceeding (because their sales were to South Texas or Joint Venture), to accept 15 cents per Mcf while all the others continue to collect higher prices. We are, by separate order, severing these four applications for permanent certificates from this proceeding and consolidate them into a new hearing on their per-

[25] These contracts are:

	Docket No.	Price	First Month's Production (Mcf)	Date of Contract
Katz	CI61-627	17¢	75,000	10-17-60
Hamon	CI61-922	18¢	58,333	11-21-60
Sun	CI61-956	17¢	300,000	12- 1-60
Texaco Inc.	CI61-961	16.4965¢	9,280	12- 1-60

The action taken here obviates the need for determining in this order whether the Hamon sale was or was not made at arm's length, and we do not adopt the examiner's discussion of this point.

manent certificates, together with all of the other holders of temporary certificates which have been issued for sales in Texas Railroad District No. 4 contracted for between September 28, 1960, when the existing 18-cent area ceiling was adopted and the effective date of the amended area ceiling in this area which we are adopting simultaneously herewith. In such a hearing all of such parties will have an opportunity to show whether the appropriate price at which they should be permanently certificated should be limited by the 15-cent per Mcf price which we have found was the in-line price as of September 28, 1960, the 16-cent per Mcf price we are adopting as the ceiling price applicable to all future contracts in this area (pending completion of the governing area price hearings), or the 18-cent per Mcf price established on September 28, 1960.

Unlike the situation in *CATCO* where all of the unconditioned price certificates by which gas was dedicated to interstate commerce were either subject to timely court review because challenged and appealed or (in one case) granted pending such review, the producers here have been operating, pending this hearing on their permanent certificate application, pursuant to effective temporary certificates containing no price condition, the validity of which have never been challenged on appeal. Under these circumstances we believe that there is no basis for ordering refunds for the period, prior to the effective date of the permanent certificates being issued herewith, during which the producers were receiving the higher prices unconditionally authorized in their temporary certificates.

The examiner did not accept a staff recommendation that all of the produger sales be conditioned to limit the take-or-pay requirement to 80 percent of the contract quantity and that the daily contract quantity be limited to one Mcf for every 8,000 Mcf of originally dedicated reserves. The examiner was of the opinion that the staff recommendation was inconsistent with our allowance of prepayments for

gas by the purchaser in a rate proceeding.[28] While we may allow such prepayments, such an allowance does not require us to approve take-or-pay provisions in producer contracts. This matter, however, is the subject of our Notice of Proposed Rule Making of May 22, 1961, in Docket No. R-199, so that it would be inappropriate to pass upon it now. However, we shall make the producer certificates issued herein subject to the results of the rule-making proceeding.

The examiner rejects the contention of the staff and agrees with Mokeen Oil Company that a provision in its contract does not constitute an indefinite escalation contrary to Section 154.93 of our Regulations. This provision is to the effect that if Mokeen has reserves in excess of the 160 billion cubic feet dedicated to the contract it has the option to dedicate these additional reserves to the contract, but if it elects not to dedicate the reserves then South Texas shall have the option "to purchase said excess gas under a separate contract at a price per Mcf which is equal to the average of the two highest prices being paid by gas transmission companies" in the field. We are not at this time determining the question as to whether the dedication of additional reserves to the contract shall constitute a dedication of reserves under the original contract or shall constitute an initial dedication of reserves. We shall deal with this question when it is presented.

South Texas and the Joint Venture

We now turn to the issues relating to South Texas and the Joint Venture. The question whether these two enterprises should be treated as independent producers or pipelines affects the kind of applications, annual reports, and rate schedules they will be required to file. In our prior

[28] See *Michigan Wisconsin Pipe Line Co.*, ... FPC ..., Opinion No. 353, Docket No. CP61-102, issued March 7, 1962. The allowance of prepayments in South Texas' rate base would have a *de minimis* effect in this proceeding.

order the Commission concluded South Texas should be treated as a pipeline for the purpose of examining the validity of its rates, and that the Joint Venture should be treated the same way although it was an independent producer within the meaning of the definition in our Rules (Section 154.92(a) as of that time). In the present proceeding the examiner determined that South Texas was a pipeline and the Joint Venture was a gatherer and producer.

As to South Texas, the examiner noted that it is engaged predominantly in the transportation of gas for distances of 100 miles or more in interstate commerce. He placed particular reliance on the Commission's order in *Ben Bolt Gathering Company, et al.*, 26 FPC —, Docket No. G-20032, *et al.*, December 12, 1961.[27] In that case the Commission found that Ben Bolt would carry gas 26 miles in a pipeline extending from connections with its suppliers at central field points to two points of sale to Natural Gas Pipeline Company and held that Ben Bolt was an interstate pipeline within the meaning of the regulations. At that time section 154.91 defined "independent producer" to include those engaged in production or gathering but "not primarily engaged in the operation of an interstate pipeline". The present regulation reads as follows:

> An "independent producer" as that term is used in this part means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who sells natural gas in interstate commerce for resale, but who is not engaged in the transportation of natural gas (other than gathering) by pipeline in interstate commerce.

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[27] The examiner noted further that by letter of September 7, 1961, rejecting South Texas' filing in Docket No. CI62-115 the Commission had already found the company to be a pipeline. This letter was limited to a requirement that South Texas file certificate applications in the full pipeline form rather than in the summary independent producer form.

South Texas receives gas from a number of fields, some near the Mexican border in Hidalgo County and others located in Starr, Brooks, Jim Hogg, Zapata, Webb and Duval Counties. Certain of its facilities, particularly those near the border, may be said to perform a gathering function in that they bring the gas to a central point. However, the South Texas line extending from the border through the various counties to the point of delivery to Transco in La Salle County performs the function of transporting natural gas that has already been gathered. Therefore, South Texas is a pipeline company within the meaning of Section 154.91(a) of our Regulations.

Both South Texas and Transco object to classification of the former as a pipeline. They contend variously that this would require that South Texas file a pipeline type of tariff, and this would, in turn, require that South Texas pool all sources of supply for the performance of its contracts with Transco and Natural Gas Pipe Line. Further, this would free South Texas from the restrictions of its contract and enable it to file a rate increase at any time it could be justified. These contentions are not valid under our Regulations. Under section 154.52 providing an exception to form and composition of a tariff the Commission "may permit special rate schedules to be filed in the form of an agreement in the case of special operating arrangements such as for exchange or transportation of natural gas". We think it desirable because of the special service rendered by South Texas that the rate restrictions of its contracts and the dedication of gas to its customers be preserved. Therefore, South Texas should meet the requirements of our Regulations with respect to pipelines by filing its contracts as special rate schedules under section 154.52.

The Joint Venture, on the other hand, is in a different position. Its line in Duval and Webb Counties does in effect bring gas to a central point, situated on the line of South Texas. The examiner found that it is engaged pre-

dominantly in gathering gas in aid of the selling producers and that it is a gatherer under the *Ben Bolt* order and is thus an independent producer. No exceptions were filed on this point, and we agree with the examiner's conclusion.

The proper rate for the South Texas sale to Transco is an important issue in these proceedings, for this rate reflects the producer prices and the costs of South Texas and the Joint Venture. South Texas' cost of service presentation, as discussed below, is based on its average purchased gas costs from the producers, which has risen with each succeeding phase of its expansion. Conditioning the producer certificates that are above 15 cents (with the exception of the four dockets referred to at page 15, *supra*) will, of course, lower the average cost of purchased gas and will require a lower price to Transco.

A basic question is whether the South Texas evidence in support of its rates is adequate. In our previous order of November 22, 1960, on which we granted rehearing, we required that South Texas, after the first two years of operation,[28] "file detailed data setting forth the cost of service upon the basis of actual experience." At the second hearing South Texas showed plant investment and income earned in the twelve months ended February 28, 1961. This includes first phase gas (50,000 Mcf per day) plus some second phase gas since temporary authority for the second phase was granted February 14, 1961. There resulted a total company rate of return of 5.90 percent and 5.61 percent applicable to the sale to Transco. South Texas also presented an adjustment to this cost computation to reflect additional costs and revenues anticipated as a result of the second phase gas. It shows a company-wide return of 5.90 percent, but 5.77 percent return applicable to the Transco deal. South Texas also filed an economic feasibility study in connection with its second phase application

[28] Deliveries under the first phase began in December of 1959.

in Docket No. G-18907, and this study was made a part of the record here. The study was a three-year forecast of earnings from the second increment of gas delivered to Transco showing a 6.7 percent return in the third year. After considering the adequacy of the evidence the examiner required that South Texas (and Joint Venture) submit the detailed cost of service data required by our previous order.

While the cost evidence referred to above falls short of a complete presentation, South Texas did file cost of service studies on February 1, 1962, purportedly in compliance with our order of November 22, 1960, but after the close of the record in this proceeding. South Texas stated it was using actual operating experience for its fiscal period ending June 30, 1961, with adjustments necessary to reflect the third year of operation after December 12, 1959; *i.e.*, 1962. Normalizing deferred taxes, and using contract minimum volumes and a 7.34 percent rate of return, the company arrived at 20.4 cents per Mcf for the total cost of service and 20.7 cents per Mcf applicable to Transco. While this latest study is not part of the record, it is supported generally by the prior cost studies, and we will admit it as evidence subject to objection.[29]

Coming to the substantive questions in the cost of service studies we find that the only factor in controversy that would make a material difference in cost level is the volume of gas used. The examiner found that if only minimum quantities were delivered, no reasonable adjustment could bring the cost of service materially below 20 cents. However, he said, there is no evidence that any greater quantity than the minimum is being delivered under either phase of the contract.

[29] PSC in its exceptions did not object to the price spread between South Texas' purchases and sales, but requested that reductions in the producer prices be reflected in the South Texas price to Transco.

The staff contends in its exceptions that the evidence does not support the use of minimum contract volumes. It points out that the South Texas contract with Transco provides for an adjustment of the minimum quantities depending on the recoverable reserves. On the basis of evidence of reserves the staff finds in the third phase an adjusted minimum of 174,103 Mcf per day instead of 150,000 Mcf per day.

In its exceptions South Texas cites testimony that, at least with respect to the first two phases, deliveries have been at the minimum contract level. Furthermore, it says, without citing the record, that it has agreed with Transco that the reserves do not exceed those required for the contract minimum of 150,000 Mcf per day, as of December 12, 1961, and no further contract reserve determination is provided until December 12, 1963. In its February 1, 1962 cost filing, South Texas refers to Transco's application in Docket No. CP62-86 which shows that South Texas will deliver no more than the contract minimum for the next twelve years. In any case it appears from this cost filing that it would take an increase in volume from the minimum of 150,000 Mcf per day to 179,400 Mcf per day to decrease the cost by only one-half cent.

While recognizing that volume is the only significant factor in the contract rate, the examiner concluded that South Texas as a pipeline should be allowed a rate of return of six percent. South Texas in its exceptions contends that this finding is unsupported by evidence and without explanation and advocates a rate of return of 7.3 percent based upon a 10 percent allowance for common equity.

In its recent cost filing South Texas arrived at a 7.34 percent rate of return using a debt ratio of 68.7 percent, a cost of debt of 6.13 percent and an allowance for common equity of 10 percent. We may note that on the basis of the cost of service filing a recomputation of South Texas' costs using a 6 percent rate of return and no allowance for taxes

would reduce the unit cost by only one cent from 20.7 cents per Mcf to 19.7 cents per Mcf.

On the treatment of Federal income taxes the examiner referred to the Commission's previous opinion, the cost evidence submitted, and the Staff's brief, and disallowed the claimed cost of Federal income taxes. In its brief, staff contended that because South Texas and its affiliated companies filed a consolidated return and South Texas had not paid Federal income taxes for the years 1959 and 1960, there seemed little justification for making provision for such taxes in the cost of service. On the other hand, South Texas points out that the greater part of the tax allowance shown in the cost of service presented by it relates to deferred income tax resulting from the use of liberalized depreciation tax accounting under Section 167 of the Internal Revenue Code. It also contends that its customers should not benefit from the losses of other companies, incurred before it was in business.

The question of the treatment of deferred taxes is before us in *Alabama-Tennessee Natural Gas Company*, Docket No. G-5471, *et al.*, and has been set for oral argument. The question of the effect of losses of affiliated companies on a consolidated tax return is before us in *Cities Service Gas Company*, Docket No. G-18799. While relevant to a degree, the tax question is small and need not be decided here. It appears from South Texas' February 1, 1962 cost filing that elimination of the entire tax allowance would reduce the cost of service to Transco by only .6 cents from 20.7 cents to 20.1 cents.

On the basis of the evidence we conclude that assuming the producer prices were proper, South Texas' 20-cent rate to Transco was proper. Since the effect of our order will be to decrease South Texas' purchased gas costs, we shall require South Texas to file an amended rate schedule reflecting this reduction in purchased gas costs.

The Joint Venture proposed a price of 15 cents per Mcf to South Texas. The examiner was of the opinion that its cost evidence submitted February 12, 1962, did not meet the requirements of the Commission's November 22, 1960, order, for no allocation of investment or operating costs was made for the use of the system to transmit gas purchased independently by Southern Coast Corporation. However, he treated its proposed price as justified because it was below the 18-cent ceiling in Texas Railroad District No. 4. For the same reason he did not find it necessary to determine a rate of return. He reached the same conclusion on Federal income taxes as in the case of South Texas.

The Joint Venture takes exception to the need for an additional allocation of its costs. It points out that there have been no sales to Tennessee on the part of the Joint Venture, and that the sale by Katz Oil Company to Southern Coast Corporation is actually a sale to the Joint Venture since under the Joint Venture agreement purchases of gas by either party to the Joint Venture are for the benefit of both and belong to the Joint Venture. The Joint Venture also contends that if its rate should be measured by the Policy Statement, there is no reason to make a finding on Federal income taxes, but if such a finding is made it should be consistent with respect to the Commission's prior holdings on liberalized depreciation.

Cost evidence presented by the Joint Venture based on the twelve months ended February 28, 1961, showed 7.01 percent return on the rate base allocable to the South Texas sale. However, the Joint Venture contended that operations during this period were not typical, since there was an abnormal volume of sales during this period in order to enable South Texas to meet its obligations before it could make connection with other supplies. Normalizing its costs for the same period the Joint Venture showed a return of only 3.39 percent on its service to South Texas.

In its February 12, 1962 cost filing the Joint Venture uses an 11 percent return and arrives at a unit cost of 20.9 cents. This was based on actual operating expense for 1961 adjusted to the test year 1962, in which it said there would be a substantial reduction in volumes. It appears that if the return were reduced to 6 percent and the Federal income tax eliminated, the unit cost would be 18.3 cents per Mcf for 1962, but only 15.4 cents per Mcf for 1961.

As explained above in connection with the producer prices the fact that the Joint Venture's price of 15 cents is below the Policy Statement area ceiling does not automatically justify it in these proceedings. However, we think that the available cost of service evidence, which is supported by the February 12, 1962 cost filing, shows that the proposed 15-cent price appropriately serves the public convenience and necessity and is justified.

A few words should be added, in conclusion, with respect to the attached statement of Commissioner Ross. His specific disagreement with our holding is limited to our failure to determine on this record the in-line price with respect to the four post-area ceiling price contracts which had been consolidated for hearing here with a much larger number of certificate applications involving contracts entered into prior to that date. This action, he suggests, involves an unwarranted reliance upon Commission expertise, as well as improper delay in affording producer and intervener alike an opportunity to test the Commission's ceiling prices by the hearing process contemplated by the statute. But as we made clear, *supra*, our determination to sever these four relatively small applications and to consider the price at which they should be permanently certificated in a new proceeding, together with the other temporary certificates issued in Texas District No. 4 since the establishment of the 18-cent ceiling price, resulted not from any unwillingness to expose these parties to the test of a hearing record, but rather from our conviction that the present record

provided an inadequate basis for determining the proper initial price for these contracts.

The precise question of the weight to be given in a certificate case to the area price in effect at the time a producer contract is executed has not previously been an issue before this Commission. The *CATCO* case and our other recent certificate decisions all involved contracts executed before area prices were announced. The record in this proceeding also focused on the question of the in-line price for the period prior to the announcement of area ceilings. It contained inadequate information for evaluating the effect, if any, of the Commission's enunciation of an 18-cent ceiling upon the in-line price in the area at the time the four post-area ceiling contracts were made.

We do not suggest that the Commission's announcement of ceiling prices as a guideline for conditioning certificates and suspending rate increases necessarily had the effect of raising the in-line price to that level but the Commission is not prepared in advance of a hearing on the issue to say that its own ceiling prices are entitled to no weight in determining the initial price under contracts executed after the ceiling prices were put into effect.

Neither can our actions here be characterized as substituting expertise for the hearing process. We have rejected, after hearing, the contention that the establishment of the 18-cent ceiling in September 1960 fixed that price as the proper in-line price in Texas Railroad District 4 as of that date; and we have placed in the hearing crucible the issue of the effect of the ceiling upon subsequent contracts—a hearing which can be concluded promptly under the new guidelines enunciated in this opinion for determining the initial price.

If we understand the implications of Commissioner Ross' statement, it would destroy the interim price ceilings which have been effective in holding the line against further

increases in producer prices pending determination of just and reasonable prices in the area rate proceedings to which we are all committed. To subscribe to this position would be an abdication of the Commission's responsibilities under the Natural Gas Act to protect consumers against excessive rates.

The Commission further finds:

(1) Transco is a "natural-gas company" within the meaning of the Natural Gas Act, and the facilities for delivery of natural gas under the temporary certificate and for which a permanent certificate is sought will be used to transport natural gas moving in interstate commerce for resale to ultimate consumers. The construction and operation of such facilities together with the sale of gas by Transco, are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(2) Transco is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Natural Gas Act and the requirements, rules and regulations of the Commission thereunder.

(3) The construction and operation of the above mentioned facilities, including the sale of natural gas to be purchased, are required by the public convenience and necessity, and a certificate therefor should be issued upon the terms and conditions of the order herein, which terms and conditions are required by the public convenience and necessity.

(4) South Texas is a "natural-gas company", and an "interstate pipeline" within the meaning of the Natural Gas Act and the Commission's regulations thereunder and its facilities, for which a certificate of public convenience and necessity is requested, will be used to transport natural gas moving in interstate commerce for resale to ultimate consumers. The construction and operation of such facili-

ties, together with the sale of gas by South Texas, are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(5) South Texas is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Natural Gas Act and the requirements, rules and regulations of the Commission thereunder.

(6) The construction and operation of the facilities referred to in finding (4), including the sale of natural gas to be purchased by South Texas, are required by the public convenience and necessity, and a certificate therefor should be issued upon the terms and conditions of this order, which terms and conditions are required by the public convenience and necessity.

(7) The public convenience and necessity requires that South Texas' price to Transco be reduced to reflect the reduction in purchased gas costs effected by this order.

(8) The following applicants

	Docket Nos.
Skelly Oil Company	G-18638
Glen A. Martin *et al.*	G-18639
Coastal States Producing Company	G-18645
W. R. Ransome, Trustee	G-18684
Tenneco Corporation	G-18765
George H. Coates, Operator, *et al.*	G-18938
Coastal States Gas Producing Company, Operator and Southern Coast Corporation	G-19016
Carrl Oil and Hawn Bros.	G-19146
H. L. Brown	G-19175
Continental Oil Company	C160-71
Slick Oil Corporation	C160-206
Sunray-Mid-Continent Oil Company	C160-428
Woods Exploration and Producing Company	C160-600
Mokeen Oil Company *et al.*	C160-789
Tex-Star Oil & Gas Corp. *et al.*	C161-43
Prado Oil and Gas Company	C161-77

	Docket Nos.
Prado Oil and Gas Company	CI61-79
Coastal States Gas Producing Company	CI61-123
George H. Coates *et al.*	CI61-178
W. E. Bakke *et al.*	CI61-258
Coastal States Gas Producing Company	CI61-471
Coastal States Gas Producing Company	CI61-472
George H. Coates *et al.*	CI61-510
Russell Maguire *et al.*	CI61-530
Coastal States Gas Producing Company	CI61-539
Coastal States Gas Producing Company	CI61-566
Morgan Minerals Corporation	CI61-648
Jake L. Hamon	CI61-930

are now, or will become upon the commencement of the sale of natural gas proposed in these proceedings, natural gas companies within the meaning of the Natural Gas Act as independent producers of natural gas, as that term is defined in Section 154.91(a) of the Commission's Regulations, engaged in the sale of natural gas in interstate commerce for resale for ultimate public consumption, and such sales, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(9) The independent producers referred to in the above paragraph (8) are able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Natural Gas Act and the requirements, rules and regulations of the Commission thereunder.

(10) The sale of natural gas as proposed by the independent producers referred to in the above paragraph (8) together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor are required by the public convenience and necessity and a certificate authorizing the same should issue to

each of them upon the terms and conditions of the order herein, which terms and conditions are required by the public convenience and necessity.

(11) The public convenience and necessity requires that the initial price charged by the independent producers referred to in (8) above be not greater than 15 cents per Mcf at 14.65 psia and that the take-or-pay requirement in their contracts be revised in accordance with our final order in Docket No. R-199, commenced by Notice of Proposed Rule Making dated May 22, 1961.

The Commission orders:

(A) A certificate of public convenience and necessity is hereby issued to Transco in Docket No. G-18920, authorizing the operation of the facilities referred to above, all as more fully described in the application in these proceedings, for the transportation and sale of natural gas in interstate commerce as set forth therein upon the terms and conditions of this order.

(B) The general terms and conditions set forth in paragraph (c)(4) of Section 157.20 of the Commission's Regulations under the Natural Gas Act shall attach to the certificates issued to Transco in paragraph (A) and to South Texas in paragraph (C) hereof.

(C) A certificate of public convenience and necessity is hereby issued to South Texas in Docket No. G-18907, authorizing the construction and operation of the facilities hereinbefore referred to, including the operation of certain facilities of the Joint Venture, all as more fully described in the applications, and amendments thereto in these proceedings, for the transportation and sale of natural gas in interstate commerce as set forth therein, upon the terms and conditions of this order.

(D) As a condition to the certificate hereby issued to it, South Texas, on the date of issuance of this order, shall

commence charging, and shall continue to charge until lawfully changed in accordance with the Natural Gas Act, a rate for the sale of gas to Transco that shall represent its present initial charge of 20 cents per Mcf at 14.65 psia, less the reduction in its average cost of purchased gas effected by this order. Such average cost of purchased gas shall be computed as of the date of issuance of this order by using the rates ordered herein for producers as provided in paragraph (G).

(E) As an additional condition to the certificate issued hereby to it, South Texas is specifically required to submit to the Commission within 60 days of the issuance of this order a Form 2 Report for the year 1961 as prescribed in Section 260.1 of the Commission's Regulations under the Natural Gas Act, and in lieu of a pipeline form of tariff, shall file special rate schedules for its sales to its customers in accordance with this opinion and order and Section 154.52 of our Regulations, subject specifically to the acceptance by the Commission of the revised initial rate for the sale to Transco. In filing such special rate schedules, South Texas is granted a waiver of the requirements of Section 154.33 of our Regulations and the second sentence of section 154.32.

(F) A certificate of public convenience and necessity is hereby issued to each of the applicants referred to in finding (8) for the sale of natural gas in interstate commerce for resale as proposed in their applications, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, upon the terms and conditions of this order.

(G) The certificates issued to the producer applicants listed below are hereby conditioned to prohibit any total initial price, including all reimbursements and charges, greater than 15 cents per Mcf at 14.65 psia from the date of issuance of this order until such prices may be lawfully changed in the manner provided by the Natural Gas Act:

Skelly Oil Co., Docket No. G-18638; Glen Martin, Docket No. G-18639; George H. Coates, Docket Nos. G-18938 and CI61-178; Continental Oil Co., Docket No. CI60-71; Sunray Midcontinent Oil Co., Docket No. CI60-428; Prado Oil & Gas Co., Docket Nos. CI61-77 and CI61-79; Coastal States Gas Producing Co., Docket Nos. CI61-471 and CI61-472; Russell Maguire, Docket No. CI61-530; Jake L. Hamon, Docket Nos. CI61-930; Mokeen Oil Company, Docket No. CI60-789; Tenneco Corporation, Docket No. G-18765; and Morgan Minerals Corp., Docket No. CI61-648.

(H) The certificates of all of the producer applicants referred to in (8) above shall be conditioned so that the take-or-pay requirement in each contract is subject to the provisions of our final order in Docket No. R-199 as of the effective date of that order.

(I) The certificates issued herein are not transferable and shall be effective only so long as each of said applicants continues the acts and operations herein authorized in accordance with the provisions of the Natural Gas Act and the applicable rules, regulations and orders of the Commission.

(J) The grant of the certificates herein shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act or of Part 154 of the Commission's Regulations under said Act requiring the filing of rate schedules for the service herein authorized and is without prejudice to any findings or orders which may have been or hereafter may be made by the Commission in any proceeding now pending or hereinafter instituted by or against the applicants. Further, the action taken in these proceedings shall not foreclose nor prejudice any further proceeding or objection relating to the operation of any price or related provisions in the gas contracts here involved.

(K) All exceptions not granted herein are hereby denied.

(L) The examiner's decision, to the extent not inconsistent herewith, is hereby adopted as part of this opinion and order.

By the Commission.

Commissioner Ross concurring in part and dissenting in part for the reasons set forth in his separate opinion appended hereto.

Commissioner Morgan concurs in Commissioner Ross' concurrence and dissent, and will file a separate dissenting opinion at a later date.

J. H. GUTRIDE
Joseph H. Gutride
Secretary

Skelly Oil Company, *et al.* Docket Nos. G-18638, *et al.*

(Issued August 30, 1962)

Ross, Commissioner, *concurring* in part and *dissenting* in part:

I concur with the decision above in all respects except for that portion of the decision which severs the dockets of the four producers which received temporary certificates following the release of the September 28, 1960 Area Price Statement.

The refusal by the majority to decide these four dockets raises very pointedly the application by this Commission of the CATCO doctrine,[1] particularly during the interim period before conclusive area rates can be established. This refusal by the majority should also be read in the context of the Phillips decision by the District of Columbia Court of Appeals[2] because it is a concrete example of the problem discussed by that court although not necessary to the decision therein.

Basically, the issues as thus raised are first, are there any standards that the Commission must consider in determining interim guide line prices and secondly, is the validity of an interim guide line price subject to attack by intervenors in a hearing on a permanent certificate.

As to the first issue, it would seem that the majority stands for the proposition that the Commission in the interim period can by decree establish prices for temporary certification on the basis of its expertise without the necessity of paying any attention to in line prices in effect up to the moment of the decree, and most importantly, without the advice, consent, or representation of any interested

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[1] *Atlantic Refining Co.* v. *FPC*, 369 U.S. 378.

[2] *State of Wisconsin, et al.* v. *FPC*, Nos. 16175, *et al.*, November 30, 1961, CADC.

party. This is surely government by fiat and I, for one, view with alarm the asserted power inherent in an administrative body in price fixing of this nature.

In this case, the guide line rate is under attack. As a matter of fact, up to September 28, 1960, the majority concedes the validity of the attack. But, as to the period from September 28, 1960 to the present date, the majority here takes the position the avenues of attack are closed. In order to meet the objections of the attacking parties, it says we will lower our guide line rates in the future and will hold a hearing to determine whether the prices contained in temporary certificates granted between September 28, 1960 and the present are out of line. First of all, does this approach approximate the language of the now-famous CATCO case? I think not. Strange as it may seem, the majority says that on September 28, 1960 the in line price became something different because the policy statement says so. This hardly concurs with the philosophy of the CATCO case. In that case the Commission was reprimanded for granting a permanent certificate without paying due attention to in lineness. The Supreme Court recognized the dangers inherent to the consumers in allowing artificial jumps of this nature.

Also, it must be fully recognized that neither the producer nor the consumer is represented at the time these interim prices are established. It is government by decree, a summary and arbitrary action. Therefore, it becomes imperative to restrict the impact of such administrative decrees to truly cases of emergency and to curtail, as much as possible, the period of time such prices are to be in effect.

This brings us to the second and paramount issue: that is, whether the parties have a right to have a decision rendered on the evidence adduced on an application for a permanent certificate, particularly where the producer has already secured a temporary certificate based upon an

artificially high guide line price. A coroilary to this, is whether temporary guide line prices can be attacked in any way within a reasonable period of time by either the producer or the consumer.

Within the last few months, there has been considerable judicial expression concerning the importance of limiting the dangers inherent in this interim period and of granting all parties the due process normally afforded contested parties. For example, in *Wisconsin* v. *F.P.C.*, *supra*, Judge Prettyman and the majority of the court expressed the opinion that the Commission can adopt such interim prices and method of regulation. However, in that case, the majority stated emphatically that it was not considering whether a particular rate fell within the area of reasonable computation. It also stated,

> "Of course, the agency would be required to be alert for artificial impulses in such a fair area price and the avenues of attack by consumers would have to be kept open without obstruction." (Slip Opinion, Page 18)

The Supreme Court has also enunciated the necessity that the Commission render prompt decisions based upon the evidence at hand and the dangers in relying upon Section 5(a) proceedings in protecting the consumer. It should be remembered that the Commission in the CATCO case urged the proposition that it didn't make too much difference as to the level of prices in granting a certificate so long as the Commission could institute a Section 5(a) proceeding. The Commission claimed the consumer would adequately be protected. The Supreme Court was emphatic in stating that the overriding intent of Congress was to give the consumer full protective coverage as to the price. In the words of the Court, "The Act was so framed to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges" and the Commission is obliged to effectively carry out this

intent. Because Section 5(a) proceedings are prospective only, gas purchasers therefore, have no protection from excessive charges collected during the pendency of a Section 5 proceeding. See also Judge Fahy's dissent in *Wisconsin* v. *F.P.C., supra.*

With these cases in mind and the principles established therein, let us examine this situation more closely. Here, to repeat, we have a questionable interim guide line price established as has been demonstrated, by no or inaccurate concepts of in lineness. For two years a number of temporary certificates and one permanent certificate were issued based on this suspect price. Intervenors in this particular case sought to contest the validity of the price in these four dockets. Now they are being told, we admit you are right *but*, because we have granted temporaries to other producers before we realized the error, we are not going to discriminate and determine the price in these four contested dockets as excessive but rather compound the felony and allow everyone to collect the price. Surely, to do justice to the concept of interim prices, particularly when such prices are set without hearing and which are found to be excessive at the time of the establishment thereof and which are under attack in a fiercely contested hearing at such time, a fact known to the parties (see Hassie Hunt Trust, et al., Docket Nos. G-19115, et al, order of December 28, 1961), the Commission should not allow these prices to remain in effect any longer than necessary. This certainly is not keeping the avenues of attack open in line with Judge Prettyman's warning. It is only partial gratification to the consumer to realize that the prices paid for all gas dedicated during these two years in these districts may be lowered prospectively in a Section 5(a) type of proceeding. The least that could be done is to set the price as to these four producers at their proper level *now*.

The interim price situation is rapidly becoming a one-way street for the consumer. Judge Brown, in his recent

decision[3] claims that the Commission is using temporary certificates as the foundation for maintaining prices during the interim. The Court held that it was unlawful to condition the temporaries against price increases during the interim since it essentially violated the intent of the Natural Gas Act. In brief, it was unfair to the producer. As a matter of fact, I concur with his opinion. But I also feel it is unfair to ask the consumer to swallow temporary prices which may have been too high, as this case proves, and then to force them to rely upon the Commission's willingness to act sua sponte for relief. I am cognizant of the Commission's brief in its request for a rehearing in the *Hunt* case.[4] In my opinion, the position therein stated, namely, "the duration of these conditions will not, as the Court seemed to think, be measured by the length of time necessary to determine just and reasonable rates for natural gas in area rate proceedings (the "four to fourteen years" estimate of Judge Prettyman) but rather by the length of time necessary for the convening of an individual hearing on application for permanent certificate and for decision thereon," is entirely inconsistent with the majority here. These cases are applications for permanent certificates but where is the decision? Furthermore, the above-quoted statement is also inconsistent with the Commission's general practice of incorporating every application for a certificate in excess of the interim area price into the general area rate proceeding.

In my view, the administrative embarrassment of a backlog and the administrative difficulties of conducting individual hearings and making decisions therein does not warrant prohibiting either the producer from seeking legitimate increases or the consumer from contesting the validity of the interim prices if such interim prices are to be

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[3] *H. L. Hunt, et al.* v. *FPC*, Nos. 19065, *et al.*, July 19, 1962 CA 10.

[4] Ibid.

the way of life for a number of years. It is hardly any consolation to either party to say "don't worry, we will review them periodically and use our ouija board to set new prices." I am less than enthusiastic about my expertise to conjure up a fair price without the benefit of hearings in which parties can introduce evidence of in lineness, favored nation and triggering clauses in accordance with CATCO. Also, as Judge Fahy suggests in *Wisconsin* v. *F.P.C., supra*, in his dissent, the Commission should not be affirmed in failing to decide present cases. It is true that that case involved Section 4(e) and 5(a) proceedings but the philosophy is the same.

It seems to me after some experience on the Commission, that we would well consider the possibility of limiting temporary certificates to cases of real emergency and grant such certificates on the basis of our temporary ceilings if they have been measured by in lineness but emphasize that the price specified is to be conditioned to the price determined in the hearing on the permanent. We then should immediately set the case for hearing. At these hearings, parties, of course, could intervene and seek to show that the guide line prices are out of line, as in this case, or that there are triggering clauses. Following conclusion of these proceedings, all these permanent certificates should be consolidated in the Area Rate Proceeding as a Section 5(a) case in the event that such proceeding based on more adequate evidence in a contested case should disclose the interim guide line price as too high.[5] However, if a party

[5] At this point, it becomes imperative that the area rate proceeding in all areas be completed as soon as possible. The producer is protected by his right under Hunt to file and fight for an increase. The consumer on the other hand risks the possibility, if area rate proceedings are delayed and the initial guide line prices are set deliberately high to avoid indivdual charges of confiscation, that the ultimate area price has in fact already been set due to the great number of certificates based on the guide line prices which a Commission would be reluctant to change for any reason.

desires to seek a rate increase, then a hearing should be scheduled and at this hearing cost of service should be permitted. This would also give the Commission and all parties a measuring rod to use in the area rate proceeding.

In conclusion, it is my firm opinion that the Commission should grant the four producers a permanent certificate at 15¢ per Mcf effective this date.

CHARLES R. ROSS, Commissioner

APPENDIX C

Docket Nos. G-18638, *et al.*

Opinion No. 362A

OPINION AND ORDER ON REHEARING
MODIFYING OPINION AND ORDER

(Issued December 18, 1962)

SWIDLER, Chairman:

Applications for rehearing were filed to our opinion and order issued August 30, 1962 in the above-entitled proceeding by both producers and parties representing the interests of consumers.[1] On October 26, 1962, we granted rehearing in order to afford further time for consideration of the issues raised. In accordance with Section 1.34(d) of our Rules, on November 20, 1962, South Texas Natural Gas Gathering Company filed a response to the joint petition for rehearing of Long Island Lighting Company and The United Gas Improvement Company (UGI). While a number of the important issues are argued in the applications for rehearing, it would be repetitious to discuss again those that have been covered by the opinion. These include particularly some of the considerations in fixing the price line, the kind of evidence to be used in determining whether an initial price is in the public convenience and necessity, and the matter of refunds.

Several of the producers argue that in judging whether their proposed initial prices are "in line", we erred in making this determination as of the date of their contracts rather than the date of initial delivery. In the case of these producers the contracts were made before the issuance of

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[1] Texaco Inc., Prado Oil and Gas Company, Continental Oil Company, Sunray DX Oil Company, Jake L. Hamon, Morgan Minerals Corporation, Mokeen Oil Company, Tenneco Corporation, New York Public Service Commission and Long Island Lighting Company, and The United Gas Improvement Co.

our Statement of General Policy No. 61-1 on September 28, 1960, 24 FPC 818, but deliveries did not commence until afterwards. We used the date of contract because we are of the opinion that the execution of the contract is the significant act on the part of buyer and seller in determining the price.[2] The existence of high-priced contracts would have a general price raising effect even before deliveries were commenced. While, of course, we have no jurisdiction over a contract that never materializes in an interstate sale, it is a matter of discretion in the exercise of our regulatory function to require that the gas sold be sold under contracts that were in line as of the time they were executed. This concept is supported by *United Gas Co.* v. *Mobile Gas Corp.*, 350 U.S. 332 where the Court recognizes that "rates are established initially by the natural gas companies by contract or otherwise." To conclude, the present or future public convenience and necessity requires that, under the circumstances here, the contract prices must be in line as of the time the contracts were executed.

Furthermore, it is often impracticable to compare dates of delivery because the date of delivery is ordinarily not known to us until after a certificate is issued, unless deliveries have commenced under a temporary authorization. In the absence of such an authorization, we ordinarily grant permission to commence deliveries when it is convenient to the buyer and seller. This is to allow time for any construction that may be required before deliveries can commence. Therefore, a comparison of the in-line price on the date of delivery with the in-line price on the dates of deliveries under other contracts frequently cannot be made.

In connection with Jake L. Hamon contends that his contract in Docket No. C161-939, while dated September 25, 1960, before the Policy Statement, was really executed

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[2] *Continental Oil Co., et al.*, 27 FPC 96, 100; see also *The Ohio Oil Co.*, ... FPC ..., Docket No. G-15385, March 21, 1962.

December 1, 1960, the same date as two letter amendments. While the course of regulation should not depend on such technicalities as the parol evidence rule, Hamon has done nothing, beyond an assertion in his application for rehearing, to show the alleged date of execution. The application for a certificate, filed December 19, 1960, repeats the September 25, 1960 date of contract; a paragraph in the contract permits termination if a certificate is not issued by December 31, 1960, an entirely unreasonable provision for a contract executed December 1, 1960, because of notice requirements.

Several producers also argue that we erred in putting a condition in the certificates issued to the producers to the effect that the take-or-pay requirement in each contract is subject to the provisions of our final order in the rule-making proceeding in Docket No. R-199. In order to avoid any indefiniteness, as suggested by the producers, we shall provide as we did in *Panhandle Eastern Pipe Line Company*, — FPC — Opinion No. 350, Docket Nos. CP60-103, *et al.*, January 15, 1962, that while we shall condition our allowance of the proposed take-or-pay conditions in the instant proceeding so as to make them subject to our determination in the rule making proceeding,[3] in no event shall we require these producers to accept provisions for less than 80 percent of the annual contract quantities.

Prado Oil and Gas Company argues that assuming that its 16.0 cent initial contract price was not "in line", the price is justified by various special considerations. As our opinion notes,[4] while under the case law the in-line price will normally be the price at which certificates should be issued in the public interest and necessity pending ultimate

[3] For this purpose we believe it is immaterial that the rule making proposal in its present form would be applicable only to contracts made in 1961 and later.

[4] Opinion No. 362, mimeo. p. 13.

determination of the just and reasonable price, there may be special considerations where the just and reasonable price will be higher or lower than the in-line price. Prado says that it has built a gathering system and compressor station to facilitate its deliveries to El Paso. However, the record shows that most of the deliveries by others at 14.5, 14.6, and 14.8 cents are field rather than wellhead sales. Furthermore, Prado's testimony shows that 85 percent of its gas comes from but thirteen gas wells, while it is the small remainder that is produced from 192 oil wells. Thus the record indicates that any extensive gathering system applies to only a small portion of the gas that is recovered in connection with oil. The compressor facilities necessary to make the casinghead gas deliverable under the contract would be the responsibility of the seller to bring the gas up to pipeline quality. Furthermore, Prado's delivery pressure requirements for gas well gas are not as stringent as the majority of other contracts in the 14.5 to 15 cent price range.[5]

In addition Prado points to the fact that its contracts contain no indefinite pricing clauses, but it may be observed that almost all of the contracts below 15 cents contain only periodic escalations. Prado also states that the gas delivered by it contains approximately 1035 Btu's per cubic foot, while its contracts provide for a minimum of only 975 Btu's per cubic foot, so that, Prado argues, the ultimate consumers will receive an increase in heating value free of charge. It is true Prado's contracts do not contain a provision for an upward price adjustment for Btu content.

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[5] Prado is permitted to deliver gas as low as 250 lbs. psia when as many as four or one third of its gas wells are unable to deliver gas against line pressure.

but neither do other contracts below the 15-cent level[6] which were listed in the staff's basic exhibit as to comparative prices (Exhibit 24). Furthermore, we may note that Prado's contracts do not provide for a downward adjustment until the content falls below 975 Btu's per cubic foot while almost all other contracts for the years 1958 through 1960 in Texas Railroad District No. 4 provide for a downward adjustment when the Btu content falls below 1000 Btu's per cubic foot. Therefore, we are of the opinion that Prado has not shown that it should be permitted an individual addition to its price in excess of the "line" found in our opinion.

Continental Oil Company objects to our taking notice of certificates for sales in District 4 at prices ranging down to six cents per Mcf without opportunity to show the contrary. Our notice here of our prior orders was not a part of the decisional process in determining the line but merely part of our explanation of the scope of the staff exhibit, which treated sales at prices of 14 cents and above. Therefore further evidence on this matter would not affect the basis of our decision.[7]

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[6] The contracts are filed as rate schedules and were involved in the following certificate dockets: *Sunray Mid-Continent Oil Co.*, Docket No. G-19511, now Sunray DX Oil Co., Rate Sch. No. 185; *Renwar Oil Corp.*, Docket No. G-15518, formerly Rate Sch. No. 11, now Tenneco Oil Co., Rate Sch. No. 7; *Phillips Petroleum Co.*, Docket No. G-15809, Rate Sch. No. 322; *Cities Service Co.*, Docket No. G-16204, Rate Sch. No. 30; *W. L. Moody III*, Docket No. G-18758, Rate Sch. No. 1; *Seas Oil Corp.*, Docket No. G-19019, Rate Sch. No. 1; *Tennessee Gas Transmission Co.*, Docket No. G-19182, Rate Schedules F-55 and F-56. The rate schedules all contain specific provisions for dehydration while this is not required in Prado's rate schedules (Nos. 1 and 2).

[7] We have taken official notice of our own orders or reports filed with us in other proceedings. *Continental Oil Co.*, 15 FPC 641; *Wisconsin v. FPC*, 201 F.2d 183 (CADC), certiorari denied, 345 U.S. 934.

In its application for rehearing the New York Public Service Commission (PSC) criticizes the basis employed in establishing the price line contending that the price line should be 14.6 cents rather than 15 cents. In the first place PSC notes that we have not identified the temporary certificates at the 14.6 cent, 14.8 cent and 15.0 cent levels that have subsequently been made permanent in other proceedings. These are listed as under temporary certificate in Exhibit 24 and are set forth in Appendix A hereto.

PSC contends that as to the two contracts at 14.8 cents [8] which are listed as permanent in Opinion No. 362, the stated price is 14.613 cents per Mcf. It is true that the base price is 14.613 cents, but we used 14.8 cents so as to include the base price plus tax reimbursements in making comparisons. *United Gas Improvement Co.* v. *F.P.C.*, 283 F.2d 817 (CA 9) certiorari denied 365 U.S. 881.

PSC's principal contention with respect to our determination of the price line is that we were relying on the two sales at 14.8 cents (or 14.613 cents as PSC would have it) and one sale at 15.0 cents [9] and that it was not a party in these proceedings because the routine notice [10] did not alert it to the significance of the price. In our opinion the notice

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[8] The 14.8 cent prices were contained in contracts of *Renwar Oil Corp.*, Docket No. G-15518 and *Phillips Petroleum Co.*, Docket No. G-15809.

[9] *Sunray Mid-Continent Oil Co.*, Docket No. G-19511.

[10] Originally as PSC points out, the *Sunray* proceeding as Docket No. G-17051 at the 15-cent price had been consolidated with *Texas Illinois Natural Gas Pipeline Company, et al.*, Docket No. G-14829, from which PSC had been excluded and which was remanded in *PSC* v. *FPC*, 295 F.2d 140 (CADC). The notice in Docket No. G-19511 which was published in the Federal Register sets forth that Sunray had filed an application for a certificate and that it proposes to sell natural gas in interstate commerce to South Texas for resale under a gas sales contract dated July 1, 1959.

was sufficient to alert PSC, as in fact it had been alerted by a similar notice with respect to a filing where it did intervene.[11]

In any event, PSC takes a too narrow view of our determination of a price line. In determining the line we were not relying merely on three contracts. We saw that there were a number of contracts involving substantial volumes of gas from 14 to 18 cents under permanent certificate. We saw that most of those above 15 cents were subject to litigation while most of those below 15 cents were not subject to litigation. We also gave a more limited degree of consideration to the pattern of untainted sales prior to 1958 and to the price range of contracts made during 1958-1960, resulting in temporary certificates including in particular those subsequently made permanent at that price. Fifteen cents, in our judgment, represented a reasonable limit on prices arrived at in contracts dated during 1958, 1959, and 1960, not subject to litigation.

PSC objects to our deferring action on the applications of four producers whose contracts were dated after September 28, 1960, when our Policy Statement was issued. As explained in our opinion we are deferring action so that all parties will have opportunity to show the effect of the 15-cent price established here, the 16-cent ceiling adopted for future contracts or the 18-cent price established on September 28, 1960. This is not a final order with respect to these producers, and our action at this time is an appropriate procedural step in view of the absence of evidence on the effect, if any, of the Commission's adoption of the September 28, 1960 ceiling prices on the pricing picture.

PSC finally argues along with Long Island Lighting Company and The United Gas Improvement Company that we

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[11] See the notice in the first *CATCO* case, *Continental Oil Co.*, 17 FPC 574, 732, 880; 21 F.R. 7783.

should have required refunds by the producers as a result of our determination of the 15-cent in-line price. The essence of our conclusion on this point is that it would be inequitable to require the producers to make refunds where they were issued temporary certificates in general language without specific provision for refunds.[12] They undertook service thereby binding themselves to deliver gas until relieved by us under a certificate that did not require nor suggest a refund. The situation was different in the *CATCO* case.[13] There was no temporary certificate and the permanent certificate was the subject of a timely petition for review. Moreover, service there had not begun until

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[12] Typical language in the temporary certificates provides in part:

> "This acceptance for filing shall not be construed as constituting approval of any rate, charge, classification, or any rule, regulation or practice affecting such rate or service contained in the rate filing; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings or orders which may be made in the final disposition of this proceeding or any other findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company."
>
> * * * * * * *
>
> "This constitutes all requisite temporary authorization to commence the sale of gas, but such authorization and acceptance of the rate schedule are without prejudice to such final disposition of the certificate application as the record may require and, furthermore, once service is commenced under this authorization it may not be discontinued without permission of the Commission issued pursuant to the provisions of the Natural Gas Act."

[13] *Continental Oil Company, et al.*, 27 FPC 96.

after judicial proceedings had been initiated,[14] so that the rates were challenged before any revenues were collected.

A refund has been required when the permanently certificated rate is less than the temporary one, but in such a case specific language advising the parties of the risk they took if they accepted the temporary certificate has uniformly been used. Since in the present proceeding there is no such provision in the temporary certificates, to proceed now and order the producers to make refunds would not be equitable regardless of any ultimate right we may have to order such refunds.

The Long Island Lighting Company and The United Gas Improvement Company contend that the costs of South Texas may be reduced as a result of a decision on the four sales severed from these proceedings as well as other sales involved in the *Amerada* proceedings[15] and as a result of decisions on the effects of a consolidated federal income tax return and liberalized depreciation tax accounting.[16] Therefore, they argue that the certificate issued to South Texas should be conditioned to require a further reduction and refunds as contemplated by the examiner. We agree that this suggestion of the interveners in part has merit. We shall therefore require that South Texas file rate changes to reflect any change in purchased gas cost effected by the *Amerada* proceeding. However, we shall not require South Texas to make refunds, for in accordance with our Opinion No. 362 herein the producers would not be required to make refunds. This condition would not work an injury on South Texas because it would not affect the return, but

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[14] The final order challenged was issued June 24, 1957 (17 FPC 880), the petition for review was filed October 7, 1957, but deliveries didn't commence until July of 1958.

[15] *Amerada Oil Company, et al.*, Docket Nos. C162-1544, *et al.*

[16] Specifically, *Cities Service Gas Co.*, Docket No. G-18799, and *Alabama-Tennessee Natural Gas Co.*, Docket No. G-5471, *et al.*

would merely pass along savings on producer sales made to it. However, the later determination of the federal income tax question would appear to create an indefinite condition that would be inequitable to South Texas. In view of the fact that the tax question is comparatively minor in effect, we will not condition South Texas' certificate to give effect to decisions in other cases which may not be decided with finality for some time. Furthermore, it would not be in the public interest to leave the present proceeding open pending the decision of these questions which are of no great moment here.

Long Island Lighting and UGI make the further point that reduction in the producer rates may lead to a higher rate of return for South Texas than its contemplated 7.34 percent. In the first place, as pointed out by South Texas, the 7.34 percent return will not be earned by it under its proposed rates. Further, it is entirely speculative as to what return will be earned under a different price structure. In any case this is not a rate case. We do not think that the earnings contemplated by South Texas are so disproportionate as to be inconsistent with the public convenience and necessity.

In its response South Texas objects to Long Island Lighting and UGI requesting the examiner's refund condition which is dependent upon a cost filing to be made by South Texas. South Texas says that it has made this cost filing and no further cost filing should be required. The cost filing made by South Texas on February 1, 1962, was apparently made in response to our prior order of November 22, 1960, in *Texaco Inc.*, 24 FPC 979, on which we granted rehearing. We have utilized this cost filing in determining whether to grant a certificate to South Texas and whether to condition that certificate. No further cost filing, if that was intended by Long Island Lighting and UGI is necessary, and the filing of February 1, 1962, will be admitted into evidence.

It has been brought to our attention that by amendment filed July 30, 1962, to the application in Docket No. CI60-206 Midhurst Oil Corporation has become the successor to Slick Oil Corporation. We shall accordingly provide that Midhurst be substituted for Slick in our Opinion and Order No. 362.

The Commission further finds:

(1) The assignments of error and grounds for rehearing set forth in the applications for rehearing filed herein present no facts or principles of law which were not considered by the Commission when it issued its Opinion No. 362, or which having now been considered warrant any change or modification of such opinion except as specified below.

(2) The request of Jake L. Hamon in Docket No. CI61-930 for severance should be denied.

The Commission Orders:

(A) The applications for rehearing filed in the above-entitled proceedings by the applicants for rehearing listed in footnote 1 above are hereby denied except as specified below.

(B) The request of Jake L. Hamon for severance of Docket No. CI61-930 is hereby denied.

(C) The following provision shall be added to paragraph (H) of our previous order. "Upon the issuance of such final order the producers accepting the certificates herein issued shall file within 30 days amended rate schedules in conformity therewith, acceptable to the Commission; provided, however, that the producers shall not be required to file take-or-pay provisions for less than 80 percent of the annual contract quantities."

(D) Paragraph (D) of our order is hereby amended to require that South Texas within 60 days after issuance of our final orders in *Amerada Petroleum Corporation, et al.*, Docket No. CI62-1544, shall file a rate for service to Transco that shall reflect any decrease in purchased gas costs effected by Docket No. CI62-1544; such change shall be effective coincidentally with the effective date of the *Amerada* rate change. At the time of making such rate filing South Texas shall also file a computation showing the derivation of such rate changes, which shall be computed as of the date of issuance of the final order in Docket No. CI62-1544 using the rates ordered therein. Such rate filing shall be subject to approval by the Commission.

(E) The cost filings made by South Texas on February 1, 1962, and by the Joint Venture on February 12, 1962, are hereby admitted into evidence.

(F) Midhurst Oil Corporation is hereby substituted for Slick Oil Corporation in Docket No. CI60-206.

By the Commission. Commissioner Ross dissenting in part to the extend that this order is inconsistent with his dissenting opinion. Commissioner Morgan not participating.

(Signed) J. H. Gutride
Joseph H. Gutride,
Secretary.

APPENDIX A

Company	Docket No.	Date of Order Granting Permanent Certificate	Rate Schedule	Price*	Est. First Month Volume (Mcf)
Texaco, Inc.	CI60-70	6-27-61	212	14.6	26,350
Little Giant Oil Co. of Texas	CI61-319	6-27-61	1	14.6	60,000
Blanco Oil Co.	CI61-82	1- 8-62	7	14.8	40,000
Graridge Corp.	CI61-519	8- 7-61	6	15.0	60,000
Cities Service Co.	CI61-1131	12-27-61	36	15.0	61,710

*In each case the price is the initial price plus tax and other reimbursements as shown in Exhibit 24.

LIBRARY
SUPREME COURT, U. S.

Nos. 987 and 1026

Office-Supreme Court, U.S.
FILED
MAY 22 1964
JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States
October Term, 1963

PRADO OIL AND GAS COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY, *Respondents*.

SKELLY OIL COMPANY, CONTINENTAL OIL COMPANY, SUNRAY DX OIL COMPANY, GEORGE H. COATES, *Petitioners*,

v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY, *Respondents*.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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OCTOBER TERM, 1963

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BRIEF FOR PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

OPINION BELOW

The opinion of the Court of Appeals is reported at 329 F.2d 242.

QUESTIONS PRESENTED

1. Whether, in a certificate proceeding under Section 7 of the Natural Gas Act, the Federal Power Commission is required as a matter of law to consider evidence of the certificate applicant's costs as a prerequisite to issuing a certificate and imposing a condition therein limiting the initial price to the in-line level.

2. Whether, in issuing a certificate following the statutorily required hearing, the Federal Power Commission has the power *and* the duty to require the applicant to refund amounts collected under an *ex parte*, pre-hearing temporary certificate to the extent such amounts are in excess of the maximum initial price found by the Commission to be required by the public convenience and necessity.

STATEMENT OF THE CASE

In 1959 and 1960, each of the five petitioners contracted to sell natural gas produced in Texas Railroad Commission District No. 4 to South Texas Natural Gas Gathering Company at an initial price of 16¢ per Mcf; these contracts were part of a larger project involving the purchase by South Texas Natural of substantial volumes of natural gas in District 4 for delivery to Transcontinental Gas Pipe Line Corporation, a major interstate gas transmission company whose principal markets are the Philadelphia-New York City metropolitan areas. Applications for certificates of public convenience and necessity for these sales were first filed

by the petitioning producers between May 1959 and January 1960.[1] Even before notice of these applications had been issued, however, the producers requested, and the Commission granted, *ex parte* temporary certificates at the contract price of 16¢ per Mcf.[2] Although the principal issue presented by these applications was whether the 16¢ level was in line—and all parties to the present appeal now concede that it was not—the Commission in permitting the sales to commence under the temporary certificates did not include as part of its authorization an express condition advising the producers that if after formal hearing the 16¢ price should be found to be out of line, the producers would be expected to refund the excess amounts collected under the temporary certificates. The certificates did contain language, however, advising the producers that the authority thus granted was "without prejudice to any findings or orders which may be made in the final

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[1] Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), provides that no person shall commence a sale of natural gas for resale in interstate commerce "unless there is in force with respect to such [person] a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations." The section further provides that such certificate shall be issued only after notice and hearing.

[2] A proviso to Section 7(c) empowers the Commission to

> "issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate . . . ."

The "emergency" alleged by the producers here (see Pet. No. 1026, p. 4) was, in essence, the loss of revenue to them during the time it would take the Commission to act on their certificate applications.

disposition of this proceeding" [3] Because of the private, almost secret nature of temporary certificates—they are granted on *ex parte* request without notice or hearing, they are issued by letter to the applicant rather than by formal order, and they are normally issued prior to the time notice has been given of the underlying certificate application—respondent Public Service Commission of the State of New York was not aware of the existence of these temporary certificates until months and even years after their issuance. During the entire period under discussion, however, respondent Federal Power Commission and petitioning producers were well aware that respondent New York Commission had consistently and publicly maintained that the in-

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[3] The "without prejudice" provision was found not once but twice in each of the temporary certificates:

> "This acceptance for filing shall not be construed as constituting approval of any rate, charge, classification, or any rule, regulation or practice affecting such rate or service contained in the rate filing; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings or orders which may be made in the final disposition of this proceeding or any other findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company.
>
> * * * *
>
> "This constitutes all requisite temporary authorization to commence the sale of gas, but such authorization and acceptance of the rate schedule are without prejudice to such final disposition of the certificate application as the record may require and, furthermore, once service is commenced under this authorization it may not be discontinued without permission of the Commission issued pursuant to the provisions of the Natural Gas Act."

line price in Texas District 4 was 14.6¢ per Mcf and had consistently and publicly sought a hearing on its contention.[4]

The Commission proceedings below finally afforded that hearing, and the Commission's decision was the first in which it determined an in-line price, conformably with *Atlantic Refining Co.* v. *Public Service Commission of New York* (*Catco*), 360 U.S. 378 (1959), for Texas Railroad District 4; it was also the first decision in which the Commission passed squarely on whether producer applicants should, on permanent certification, be required to refund excess amounts collected under temporary certificates lacking an "express" refund condition. We adopt here the Court of Appeals' summary of the Commission's action (329 F.2d at 244):

> "On August 30, 1962, the Commission issued its own final decision in which it found that the 'in-line' price for the area with respect to contracts entered into prior to September 28, 1960, was 15 cents per Mcf. Accordingly, it approved the sales in question on the condition that the price charged be not in excess of 15 cents. It refused, however, to order a refund of the charges in excess of 15 cents collected under the temporary authorizations. The Commission was initially of the opinion that since no refund provision had been included in the temporary certificates there was 'no basis for ordering refunds.' In its later order of December 18, 1962, denying reconsideration, the Commission explained that it would be inequitable to require refunds when the temporary certificates contained no provision clearly apprising the producers of the

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[4] See, *e.g.*, *Public Service Commission of New York* v. *F.P.C.*, 295 F.2d 140 (D.C. Cir. 1961), *cert denied sub nom. Shell Oil Co.* v. *Public Service Commission of New York*, 368 U.S. 948.

risk in operating under a temporary certificate subject to a refund obligation." (Footnotes omitted.)

Cross-appeals to the District of Columbia Circuit followed: The Public Service Commission of the State of New York, The United Gas Improvement Company, and Long Island Lighting Company (D.C. Cir. Nos. 17582 and 17628) challenged the Commission's failure to require refunds of the excess amounts; while Continental Oil Company, Sunray DX Oil Company, and Prado Oil and Gas Company (D.C. Cir. Nos. 17627 and 17859) challenged the Commission's finding that the in-line level was 15¢ per Mcf.

Writing for a unanimous panel, Judge Fahy rejected the producer contention that 15¢ was not the proper in-line figure, but sustained the consumer contention that the Commission erred in holding that the absence of an express refund condition in the temporary certificate provided a basis—either legal or equitable—for permitting the producers to retain the excess amounts previously collected.

Only Prado, petitioner in No. 987, challenges the Court of Appeals' decision on the in-line finding, and that challenge is limited to the single contention that in determining the in-line price, the Commission should have considered the cost data presented by certain of the producer applicants. This issue was one of several decided by the court below in the Prado-Continental dockets, in which the New York Commission was an intervenor in opposition.

Both Prado and the petitioners in No. 1026 challenge the Court of Appeals' decision on the refund issue. This issue was decided by the court below in the New

York Commission-United Gas Improvement dockets, in which the Federal Power Commission was respondent and the petitioners in this Court were intervenors in support of the Commission's decision.

In their petitions for certiorari the petitioning producers have properly named the New York Commission, The United Gas Improvement Company, and Long Island Lighting Company as respondents; however, with respect to the refund issue—the sole issue raised by petitioners in No. 1026—it is clear that the FPC has at no time during this litigation been aligned with the New York Commission *et al.*, but has, to the contrary, been aligned with the producers. Accordingly, the Commission should be treated as an intervenor-petitioner rather than as a respondent.

ARGUMENT

I. No certiorari issue is presented by Prado's contention that, as a matter of law, the Commission is required to consider cost data in a Section 7 certificate proceeding.

Prado suggests two reasons (Pet., pp. 10-12) for review by this Court of its contention that the Commission is required as a matter of law to consider cost data in a Section 7 certificate proceeding. First, it states—quite incorrectly—that the decision of the court below is inconsistent with this Court's decision in *Cities Service Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959). Second, it asserts that there is a need for "clarification" of the evidentiary standards which the Commission should be required to apply in Section 7 certificate proceedings. We would note at the very outset that, far from being inconsistent with *Cities Service*, the decision of the court below is required by *Cities Service*, and that, even assuming it to be this Court's

function to "clarify" evidentiary standards where there is no claim of conflict among the circuits or of gross error, the evidentiary standards have been made abundantly clear by prior decisions.

The problem in *Cateo* was that the Commission had unconditionally certificated an out-of-line price without any evidence that such price was just and reasonable. The Commission defended its action on the ground that it was impractical to determine the just and reasonable rate in a certificate case and that the out-of-line price it had unconditionally certificated could be tested in a subsequent rate investigation under Section 5 of the Act and could be reduced if found excessive. This Court found the Commission's reasoning unpersuasive, since unconditional certification of an out-of-line price would permit the producer to collect and retain that price, without any possibility of refund even should the price prove to be excessive, during the long period between certification and the ultimate conclusion of a Section 5 investigation. The Court very specifically held that the Commission was not required to determine justness and reasonableness in the certificate proceeding, and that the Commission's responsibility to protect the consumer could be adequately discharged through the use of conditions to hold the line, 360 U.S. at 390-92.[5]

Thus, where a proposed initial price is out of line, the Commission has two alternatives—it may make an investigation of the justness and reasonableness of the rate and issue a certificate at the just and reasonable

[5] These conditions were necessary, as Judge J. Skelly Wright pointed out in a subsequent *Atlantic Refining* case, because "the public must be protected from the time the gas first enters interstate commerce." *Atlantic Refining Co.* v. *F.P.C.*, 316 F.2d 677 at 679 (D.C. Cir. 1963).

level, or it may impose a rate condition designed to hold the line and protect the public during the period in which the propriety of the initial rate is being tested.[6] Accordingly, where the Commission has actually certificated an out-of-line price, its action can be sustained only if it has made the requisite findings of justness and reasonableness; and it was for this reason that the Court in *Catco* searched the record for supporting cost data, see 360 U.S. at 392-93. Prado thus obviously errs when it relies on the language found in this section of the Court's opinion to support its thesis that cost data must be received and utilized by the Commission in a certificate case.

Not only is *Catco* clear and unambiguous in holding that cost data need not be received in a certificate case, but the subsequent court of appeals decisions, even prior to the decision of the court below, have consistently and expressly ruled, as did the court below, that

> "the standards of Sections 4 and 5 are not those to be used in conditioning a certificate issued under Section 7; otherwise the purpose of *Catco* to avoid the consequences of the well nigh interminable proceedings incident to a rate case would be defeated." 329 F.2d at 246-47.

See, for example, *Atlantic Refining Co.* v. *F.P.C.*, 316 F.2d 677 at 680 (D.C. Cir. 1963); *California Oil Co.* v. *F.P.C.*, 315 F.2d 652 at 655-657, 659 (10th Cir. 1963); *Texaco Inc.* v. *F.P.C.*, 290 F.2d 149 at 155, 157 (5th Cir. 1961).

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[6] See the opinion of Judge Bazelon in *Oklahoma Natural Gas Co.* v. *F.P.C.*, 257 F.2d 634 at 652-53 (D.C. Cir. 1958) (dissenting opinion); *cert. granted*, 358 U.S. 877, cert. dismissed on petitioner's allegation of mootness, 358 U.S. 948.

II. The nature of the Commission's responsibility to require refunds of excess amounts collected under temporary certificates raises a certiorari question, though not in the precise form presented by petitioners.

In the earlier initial price cases before this Court, no question of temporary certificates was involved, *Catco, supra; Public Service Commission of New York* v. *F.P.C.*, 361 U.S. 195 (1959). Then, at about the time those cases were pending on review, the Commission began an extensive, but unpublicized, program[7] of issuing temporary certificates, pursuant to its "emergency" powers as defined by Section 157.28 of its Regulations, in situations involving economic detriment to the applicant.[8] These certificates were issued virtually in the dark of night—*ex parte*, without notice or hearing, prior to the time notice was given of the underlying application, via private letter rather than by public order. In some cases the certificates contained an express refund condition, in other cases they did not, and in many cases where refund conditions were originally imposed they were deleted by the same private *ex parte* procedures, with no notice given to consumer interests, such as respondent, which had been publicly, consistently, and, as the result of this Court's *Catco* decision, effectively contending against unconditioned certification of out-of-line initial prices.

By the time respondent, and other consumer interests, became aware of the Commission's policy, there were

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[7] Although the existence of the program was carefully shielded from public view, it appears to have become well-known to the producing industry.

[8] This Regulation was purportedly adopted pursuant to the proviso to Section 7(c), (see note 2, *supra*), which grants the Commission power to issue temporary certificates "in cases of emergency."

thousands of these temporaries outstanding, with new ones being issued at the rate of over one hundred a month. While the Commission's discretion to broaden its "emergency" power to encompass virtually every certificate application seemed of dubious legality, see *Algonquin Gas Transmission Co.* v. *F.P.C.*, 201 F.2d 334 (1st Cir. 1953), the New York Commission felt that so long as the FPC on granting permanent certification (which required a hearing in which the price required by the public convenience and necessity would be determined) ordered the applicant to disgorge the excess amounts collected under the temporary certificate, there would in end result be no injury to the consumer, within the meaning of *Catco*.

At first, the Commission seemed disposed and prepared, in granting permanent certification, to correct any errors that would result from producer retention of excess amounts collected under temporary certificates by requiring the producer to refund all amounts in excess of the in-line price, as determined at a public hearing where both producer and consumer interests were represented; the Commission stated that, by its very nature, a temporary certificate, even where unconditioned, conferred no "unalterable" rights, but rather contemplated "a continuous course of adjustment until the time that a final order determines the conditions under which a permanent certificate shall be issued." *Continental Oil Co.*, 27 FPC 96 at 110 (1962); and see *Socony Mobil Oil Co.*, 27 FPC 347 (1962), and *Texaco-Seaboard Inc.*, 27 FPC 15 (1962).

Then, in August 1962, in its *Skelly* decision (the subject of the review proceedings below), the Commission for the first time ruled that producers would be permitted to retain out-of-line prices collected pursuant

to their *ex parte* temporary certificates in every case where the temporary did not contain an "express" refund condition.

Because this ruling meant that, contrary to the intent of *Catco*, the consumer would have no protection from excess rates and charges during the "nigh interminable" period between temporary and permanent certification —for not only are temporary certificates issued by the thousands but they frequently remain in effect for as long as four and five years — respondent New York Commission took action on two fronts: (1) It took a direct appeal from the Commission's *Skelly* opinion, urging that notwithstanding the absence of an express refund condition, the Commission was required as a matter of law to order refunds of excess amounts collected under temporary certificates; and (2) it appealed from the Commission's issuance of three temporary certificates permitting collection of out-of-line prices with no express refund condition, contending, *inter alia*, that the Commission's emergency power to issue temporary certificates under the proviso to Section 7(c) applied only to cases of emergent public need and not to cases involving only economic detriment to the applicant, and that, in any event, the certificates were invalid, within the meaning of *Catco*, because of the combination of an out-of-line price and the absence of an express refund condition. The two appeals were heard ten days apart by the same panel of the District of Columbia Circuit, but the second appeal, *Public Service Commission of New York* v. *F.P.C.*, 327 F.2d 893, was decided first, on January 2, 1964. In that decision, the court sustained the Commission's power to issue temporary certificates to prevent economic detriment to the applicant, but ruled that the absence of an express

refund condition in the temporary certificate did not foreclose the question of refunds on permanent certification. Three weeks later, in the decision which is the subject of the instant petitions for certiorari, *Public Service Commission of New York* v. *F.P.C.*, 329 F.2d 242, the court reaffirmed the position it had taken in its companion January 2 decision by holding that the consumer interests were aggrieved by the lack of a refund requirement in the *permanent* certificate rather than by the lack of a refund condition in the *temporary* certificate, 329 F.2d at 248, and that the absence of a refund condition in the temporary certificate did not furnish any basis for permitting the producer to retain past excesses, 329 F.2d at 249-50.

Although the court refused, in terms, to hold, as requested by the New York Commission, that refund of excess amounts was required as a matter of law ("The existence of the power [to order refunds] does not mean that its exercise is mandatory, as petitioners . . . assert," 329 F.2d at 250), the *practical* effect of its decision is that refunds are mandatory. This is so because, while holding that the ordering of refunds must turn on "equitable considerations," the court expressly rejected as a decisive factor in such evaluation the only "equitable consideration" advanced to justify retention of the excessive prices—the absence of an express refund condition.[9] For this reason, the case should have been

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[9] Where the temporary certificate contains an express refund condition, the Commission has, without exception, required refund of the excess amounts collected, see, *e.g.*, *Texaco Inc.* v. *F.P.C.*, 290 F.2d 149 (5th Cir. 1961), and it is unchallenged here that had the temporaries contained an express refund condition (all other considerations remaining the same), the Commission would have ordered refunds.

remanded with directions that the Commission order refunds of excess amounts rather than for further proceedings to consider the "equitable considerations." See *N.L.R.B.* v. *Fruit and Vegetable Packers*, — U.S. —, 84 S.Ct. 1063 at 1066, 1071 (1964), reversing *Fruit and Vegetable Packers* v. *N.L.R.B.*, 308 F.2d 311 (D.C. Cir. 1962); see also *U.S.* v. *El Paso Natural Gas Co.*, — U.S. —, 84 S.Ct. 1044 at 1050 (1964).

Thus, even though the practical effect and ultimate meaning of the Court of Appeals' decision is to require refunds of excess amounts, the remand fashioned by the court below has serious shortcomings. By calling for still further proceedings where there are no new pertinent facts which could possibly affect the outcome, the remand unduly and unnecessarily delays justice. Moreover, there exists a danger, as demonstrated by the past history in this initial price field, that a general mandate may be mistakenly interpreted as no mandate at all. That this is a very real and present danger is indicated by the Commission's most recent decision on the initial price-refund problem—*Amerada Petroleum Corp.*, Opinion No. 422, issued March 23, 1964 (two months *after* the decision of the court below)—where the Commission once again declined to order refunds of excess amounts collected under temporary certificates containing no "express" refund condition.

Under such circumstances, we believe it both appropriate and desirable for the Court to grant the writ of certiorari on the refund issue.

CONCLUSION

For the foregoing reasons, respondent Public Service Commission of the State of New York

(1) opposes certiorari on the second question presented by petitioner in No. 987;

(2) does not oppose certiorari on the first question presented by petitioner in No. 987 and the single question presented by petitioners in No. 1026, provided the question is phrased as follows:

> Whether, in issuing a certificate following the statutorily required hearing, the Federal Power Commission has the power *and* the duty to require the applicant to refund amounts collected under an *ex parte*, pre-hearing, temporary certificate to the extent such amounts are in excess of the maximum initial price found by the Commission to be required by the public convenience and necessity.

In the event the writ is granted, respondent respectfully requests that the Federal Power Commission, named by petitioners as a respondent, be designated an intervenor-petitioner.

Respectfully submitted,

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May 22, 1964.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 987

PRADO OIL AND GAS COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING CO.

No. 1026

SKELLY OIL COMPANY, CONTINENTAL OIL COMPANY, SUNRAY DX OIL COMPANY, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Prado Pet. App. 18–34), is reported at 329 F. 2d 242. The opinions of the

Commission (R. 594–639, 708–721) are reported at 28 FPC 401 and 1065.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1964. The petitions for writs of certiorari were filed on April 10, 1964, and April 21, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission, in permanently certificating a producer's sales of natural gas at an initial price below the contract price, may condition such certificate upon a refund of excess charges previously collected under a temporary emergency certificate not so conditioned.

2. Whether the Federal Power Commission is required to consider cost and financial requirements evidence in determining the initial price at which it will certificate a producer sale.[1]

STATUTE AND REGULATIONS

The pertinent provisions of the Natural Gas Act and Section 157.28 of the Commission's regulations appear in Prado's petition, Appendix A, pp. 15–17.

STATEMENT

In 1959 and 1960 petitioners entered into contracts with South Texas Natural Gas Gathering Company for the sale of natural gas at 16 cents per Mcf. These sales were part of an integrated project in-

[1] This question is presented only in No. 987.

volving numerous purchases by South Texas for resale to Transcontinental Gas Pipeline Corporation in Texas Railroad District No. 4, located in the southern tip of Texas. The Commission proceedings were initiated between May 1959 and January 1960 by the filing of applications for certificates of public convenience and necessity [2] and the related applications of the purchasing pipelines, South Texas and Transco. The producers proposed to sell to South Texas at prices ranging from 9 to 17 cents per Mcf, and South Texas proposed to resell to Transco, to augment the latter's overall system gas supply. The Commission noticed these applications in the Federal Register [3] (24 Fed. Reg. 9519, November 25, 1959), consolidated them, and set them for hearing. Even before the notice, emergency authorizations had been obtained *ex parte* by many of the producers, including petitioners Coates and Continental, to commence service pending Commission decision on their applications.[4] These "temporaries" contained no express refund conditions but did contain provisions expressly reserving all questions of price, as the court below noted.[5]

[2] These included applications of petitioners Skelly, Coates and Continental.

[3] A number of additional producer applications, including Continental's, were not noticed or consolidated until February 19, 1960. 25 Fed. Reg. 1735 (February 27, 1960).

[4] The issuance of temporary authorizations for such emergency purposes is authorized by Section 7(c) of the Act, 15 U.S.C. 717f(c) and by § 157.28 of the Commission's Regulations under the Natural Gas Act (Prado Pet. 16–17). See *Federal Power Commission* v. *H. L. Hunt*, No. 273, this Term, decided March 30, 1964 (Slip Op. p. 6).

[5] Prado Pet. App. 31–32. The provisions read as follows (see, *e.g.*, R. 383–384): "This acceptance for filing shall not be con-

Temporary certificates were similarly issued to the later applicants before their applications were noticed and consolidated.[6]

The New York Public Service Commission and various eastern distributing companies intervened (R. 408–425), the latter alleging in their petitions that some of the proposed prices would cause a rise in the existing price level.[7]

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strued as constituting approval of any rate, charge, classification, or any rule, regulation or practice affecting such rate or service contained in the rate filing; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings or orders which may be made in the final disposition of this proceeding or any other findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company.

* * * * * *

"This constitutes all requisite temporary authorization to commence the sale of gas, but such authorization and acceptance of the rate schedule are without prejudice to such final disposition of the certificate application as the record may require and, furthermore, once service is commenced under this authorization it may not be discontinued without permission of the Commission issued pursuant to the provisions of the Natural Gas Act."

[6] Of the present petitioners only petitioner Skelly did not commence service until after it had accepted a permanent certificate (issued on November 22, 1960, see *infra*, p. 5), and it commenced service on February 23, 1961 (Tr. 4929) although on January 19, 1961, the Commission had granted New York's rehearing application challenging the certificate price (R. 527). (The citation "Tr." is to an unprinted portion of the Commission record, as certified to the court below.)

[7] Although these petitions indicated a knowledge that producers had or would commence service under temporary authorizations, no request for the inclusion of express refund conditions was made.

After hearing, the Commission on November 22, 1960, found that the producers' proposed prices were "in-line" and granted the permanent certificates (R. 495–505, 24 F.P.C. 979). The New York Commission sought rehearing, contending that the proper "in-line" price for the particular area was 14.6 cents per Mcf (Prado Pet. App. 20; R. 513–526). By then the Commission's practice of certificating producer sales at initial prices which it found "in-line" with the highest levels to which prices had risen at the time of the *Catco* decision (*Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378) had been strongly disapproved by two courts of appeals [8] and was under consideration in two others.[9] On January 19, 1961, the Commission granted the rehearing (R. 527).[10]

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[8] *United Gas Improvement Co.* v. *Federal Power Commission*, 283 F. 2d 817 (C.A. 9), certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 365 U.S. 879, and *California Co.* v. *United Gas Improvement Co.*, 365 U.S. 881; *P.S.C. of New York* v. *Federal Power Commission*, 287 F. 2d 146 (C.A.D.C.), certiorari denied *sub nom. Hope Natural Gas Co.* v. *P.S.C. of New York*, 365 U.S. 880, and *Shell Oil Co.* v. *P.S.C. of New York*, 365 U.S. 882.

[9] *United Gas Improvement Co.* v. *Federal Power Commission*, 287 F. 2d 159 (C.A. 10); *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 133 (C.A. 5), certiorari denied *sub nom. Sun Oil Co.* v. *United Gas Improvement Co.*, 368 U.S. 823; *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 147 (C.A. 5), certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 366 U.S. 965.

[10] Later the proceeding was consolidated with thirty-five additional producer applications relating to the same project. 26 Fed. Reg. 2323 (March 17, 1961). Temporary authorizations were granted those applicants, also, before their applications were noticed and without any explicit refund conditions but with express reservation of all questions of price. Four days

After that hearing and examiner's decision, the Commission (by then comprised of an entirely new membership) issued the August 30, 1962, order which was reviewed below. It found that 15 cents per Mcf was the in-line price for sales under contracts executed prior to September 28, 1960,[11] and that the prices called for by several of the contracts, including those of petitioners, were out of line. As to all such sales, it imposed a condition prohibiting the charging of an initial price in excess of 15 cents unless and until that price should duly be changed under the rate provisions of the Act (R. 600–614, 631–632).[12]

The Commission based its determination of "in-lineness" on comparisons with prevailing prices in transactions which might properly be considered under the principles laid down in *Catco* (*supra*, p. 5) and succeeding decisions of the courts of appeals (*infra*, p. 13, n. 17; R. 604–609; see also R. 709–710, 714–715). With respect to the additional economic and financial evidence introduced by Texaco and Continental to justify their proposed prices of

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before the hearing was to commence, the Commission, without objection from any party, granted all of the producer applications at proposed initial prices of 14.5 cents or less (R. 534–538).

[11] Later, in *Amerada Petroleum Corp., et al.*, Docket No. C162–1544, *et al.*, Opinion No. 422, issued March 23, 1964, the Commission found 16 cents to be the in-line price for sales contracted after issuance of the Statement of General Policy on September 28, 1960 (24 F.P.C. 818).

[12] This condition did not prevent the affected producers from filing increased rates up to the contract price immediately after the conditioned rate became effective. Indeed, Prado made an increased filing to 16.7 cents with respect to one of the rate schedules here involved and put that rate into effect, after a five months' suspension, in September 1963.

16.4965 cents and 16 cents, respectively, the Commission held (R. 610–611):

> * * * [W]e do not think it necessary or appropriate in a certificate proceeding to consider evidence of area costs or financial requirements, or of individual company costs or financial requirements. Any such approach is of limited utility and leads to complicated, long-drawn-out proceedings, detrimental to the public [footnote omitted].
>
> * * * * * *
>
> Obviously, we cannot permit every individual certificate case to be converted into a full-blown rate case; the proof in this proceeding demonstrates the lack of utility of a limited cost of service presentation.[13]

[13] The Commission illustrated this by specific reference to Texaco's estimates of cost of future replacement of present reserves rather than their actual costs (R. 610–611) and Texaco's assumption that such costs should be borne by present customers rather than venture capital. It also pointed out that Continental's evidence that it would have to receive $2.78 per Mcf in order to recoup its cash outlay, was so narrowly limited that it would not form a proper basis for appraising financial requirements (R. 612). But the Commission was careful to emphasize it was not excluding the possibility that a price above an in-line price might be permitted (R. 611):

"* * * We do not mean to foreclose the possibility that a producer may present compelling circumstances in a particular proceeding to justify a higher price, but we wish to emphasize that with the guidelines herein established the price issue in certificate cases should be handled expeditiously and that before any evidence which would customarily be presented in establishing a just and reasonable rate can be admitted in evidence, a convincing showing must be made that such evidence is essential to the just disposition of the price question."

With respect to the intervenors' contention that refunds should be ordered of all amounts already collected under the temporaries in excess of the proper initial price, the Commission, in its opinion on rehearing, held "that it would be inequitable to require the producers to make refunds where they were issued temporary certificates in general language without specific provision for refunds" (R. 716).

A unanimous court of appeals affirmed the Commission's "in-line" determination, holding, *inter alia,* that the Commission was not required to consider the evidence of costs and financial requirements introduced by some of the producers. The court further concluded that the Commission had the power to order refunds for the period of service under a temporary certificate even though that certificate contained no express refund condition, explaining in part (Prado Pet. App. 31):

> * * * The basic purpose of the Natural Gas Act is consumer protection from unreasonable prices, and refund of excessive utility rates is a well recognized remedy. It would need to be quite clear from the Act that the Commission lacked the power to use such a remedy for the courts to deny it. We find no such clarity. The power does not depend upon an explicit refund provision in a temporary certificate. Should the occasion be appropriate for its exercise the power resides in the Commission when it grants a permanent certificate. To hold that it may not then require refund of excessive prices previously permitted without notice or hearing or

> mature consideration, since the Commission acted on an emergent and temporary basis, would be inconsistent with the regulatory responsibility of the Commission to aid in the ascertainment and authorization of just and reasonable rates.

While thus rejecting the producers' contention that the Commission was without power to order refunds, the court also rejected the claim of the New York Commission and a group of distributing companies that the ordering of refunds was mandatory. And while it agreed with the Commission, that equitable considerations governed the issuance of a refund order, it held that the absence of refund conditions was not in itself a controlling factor. Accordingly, it remanded the case to the Commission for "further development and fuller consideration of the equitable factors other than those thought to flow from the mere absence of an explicit refund condition in the temporary certificates" (Prado Pet. App. 34).

ARGUMENT

1. Prado's principal, and Skelly's sole, contention is that the Commission has no power to require refunds of excessive charges collected under temporary certificates issued without express refund conditions. We do not deny the importance of that question.[14] There

[14] The decision below appears to be inconsistent with the reasoning of the Tenth Circuit in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 270 F. 2d 404, 407–410. There, the court held that the Commission could not properly require the producer, as a condition for receiving a temporary

is no occasion, however, for this Court to consider the issue at the present stage of the proceedings. The Commission has not yet required refunds to be made,

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certificate, to agree in advance to refund charges in excess of those ultimately found proper, since such a condition denied the producer's "right to have the Commission act upon its application with such certainty as to allow the exercise of choice upon Sunray's part." We note, however that the court in *Sunray* made no attempt to reconcile that producer's desire for certainty with the countervailing interests of consumers and distributors, who had no notice or opportunity to be heard at the time the temporary certificate was issued. In *Sunray*, unlike the present case, there was no intervention by representatives of the consumer interests, and the Commission did not submit to the Court the considerations, urged by the interveners here, which the court below deemed persuasive. It is quite possible, therefore, that the Tenth Circuit would reach a different result if the issue were again placed before it.

Contrary to Skelly's contention, the decision below is not in conflict with the decisions of this Court holding that the Commission has no power to order "reparations." *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 254; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618; see also *Signal Oil and Gas Co.* v. *Federal Power Commission*, 238 F. 2d 771 (C.A. 3), certiorari denied, 353 U.S. 923. The Commission's authority to order refunds of excessive charges collected pursuant to a temporary certificate is no more dependent upon the power to award "reparations" than refunds of excesses of rates collected under a judicial stay *pendente lite*. See *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577, and particularly the concurring opinion of Mr. Justice Frankfurter. It stems, not from any "reparations" power, but from the inherently conditional character of the temporary certificate itself. Such certificates are issued at the producer's behest in cases of emergency, without a showing of public convenience and necessity and without notice to or opportunity to be heard by other interested parties. See *Federal Power Commission* v. *H. L. Hunt*, No. 273, this Term (decided March 30, 1964). It would be quite unfair to those parties if the producer were permitted to retain the excessive amounts

having declined to do so on equitable grounds. The court below concluded that the Commission had failed to take account of all relevant equitable factors and, instead, had improperly treated the absence of refund conditions as decisive; accordingly, the court remanded the case for fuller consideration. We do not challenge that ruling. It is entirely possible, however, that the Commission, after reviewing all pertinent factors, will again reach the conclusion that refunds are inappropriate. In that event, the issue tendered by the petitioners would disappear. On the other hand, should refunds be ordered, petitioners would still be in a position to challenge the Commission's power [15] and also to raise any new issues concerning the manner in which that power was exercised.

Adherence to this Court's policy of declining to review interlocutory decisions [16] seems particularly

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collected pursuant to such emergency authorization, except in cases where a full consideration of the competing equities so warranted. In the instant case, moreover, the tentative and conditional nature of the price designated in the temporary certificate was made explicit by the provision that acceptance "shall [not] be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings or orders which may be made in the final disposition of this proceeding or any other findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company." *Supra*, p. 4, n. 5.

[15] *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 257–258; see also *Urie* v. *Thompson*, 337 U.S. 163, 172–173; *United States* v. *U.S. Smelting Co.*, 339 U.S. 186, 198–199; Stern and Gressman, *Supreme Court Practice* (3d ed. 1962), Section 2-2.

[16] See Stern and Gressman, *Supreme Court Practice*, (3d ed. 1962), Section 4-19.

appropriate here. In both petitions, the argument is made (Prado Pet. 8–9; Skelly Pet. 25) that producers typically incur substantial and non-recoverable costs—*e.g.*, royalties, federal income taxes, state production taxes—on the basis of the prices specified in their temporary certificates and hence would be severely injured if refunds were later ordered. But this is precisely the kind of equitable consideration which the Commission must evaluate in the remand proceeding in light of the concrete evidence adduced by the parties. The courts will be able to appraise the force of petitioners' argument more realistically when they have the benefit of the relevant facts.

2. Contrary to Prado's contention (Prado Pet. 10–12), the Commission's refusal to consider the producers' costs or financial requirements in passing upon their applications for permanent certificates was both proper and consistent with *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378 (*Catco*). In *Catco*, this Court made it clear (360 U.S. at 390–391) that the Act does not require a determination of just and reasonable rates in a certificate proceeding under Section 7 as it does in a rate case under either Section 4 or Section 5 and that where "the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary." The rule was reiterated recently in *Federal Power Com-*

mission v. *H. L. Hunt*, No. 273, this Term (decided March 30, 1964).

In accordance with *Catco* and subsequent decisions,[17] the Commission has followed the practice of certificating initial sales in interstate commerce at prices no higher than those at which substantial volumes of gas were purchased under properly certificated contracts executed in the same area during the same general period. For the period and area involved here that price was 15 cents—a finding affirmed below and not now challenged. In terms of the statutory standard of "public convenience and necessity," the appropriateness of the "in-line price" criterion and the irrelevance of the economic data relied upon by Prado are readily apparent, for the public convenience and necessity would rarely require that gas be allowed to enter the interstate market at prices higher than those which other persons negotiating at the same time in the same area are willing to accept for

[17] *Public Service Commission of New York* v. *Federal Power Commission*, 361 U.S. 195, reversing *United Gas Improvement Company* v. *Federal Power Commission*, 269 F. 2d 865 (C.A. 3); *Atlantic Refining Co.* v. *Federal Power Commission*, 316 F. 2d 677 (C.A. D.C.); *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 133 (C.A. 5), certiorari denied *sub nom. Sun Oil Co.* v. *United Gas Improvement Co.*, 368 U.S. 823; *United Gas Improvement Co.* v. *Federal Power Commission*, 287 F. 2d 159 (C.A. 10); *Public Service Commission of New York* v. *Federal Power Commission*, 287 F. 2d 146 (C.A. D.C.), certiorari denied *sub nom. Hope Natural Gas Co.* v. *Public Service Commission of New York*, 365 U.S. 880, and *Shell Oil Co.* v. *Public Service Commission of New York*, 365 U.S. 882; and *United Gas Improvement Co.* v. *Federal Power Commission*, 283 F. 2d 817 (C.A. 9), certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 365 U.S. 879, and *California Co.* v. *United Gas Improvement Co.*, 365 U.S. 881.

the same product. Certainly this is true where, as here, substantial amounts of gas were contracted for at prices lower than those of Prado.

Prado's reliance on *Catco* is predicated on a misreading of the opinion (360 U.S. at 392–393). *Catco* involved the first sales from newly developed fields off the shore of South Louisiana (360 U.S. at 385); an area in which no price line had yet been established. Since the purchaser, Tennessee Gas Transmission Company, was buying gas from fields in a nearby off-shore area at prices substantially lower than those of its *Catco* contracts, the Court understandably questioned the producers' failure to show any factual distinction *between the two areas.*[18] It scarcely follows, however, that the Commission must look to cost or similar economic evidence in the normal certificate case arising in an already developed area where the "in-line" price is readily determinable. Petitioner's contrary contention would have the effect of converting every individual certificate case into a full-blown rate case, a result which *Catco* did not contemplate. *Atlantic Refining Co.* v. *Federal Power Commission, supra,* 360 U.S. at 390. See, also, *California Oil Co., Western Division* v. *Federal Power Commission,* 315 F. 2d 652, 659–660 (C.A. 10); *United Gas Improvement Co.* v. *Federal Power Com-*

[18] In a comparable situation where gas was sold from a new production area, the Commission has since made just such a comparison and imposed a price-reducing condition largely on the basis of the price level in an existing area adjusted by certain differences between the two areas. See *El Paso Natural Gas Co.*, 23 FPC 369, 376–377, affirmed *sub nom. Texaco, Inc.* v. *Federal Power Commission*, 290 F. 2d 149 (C.A. 5).

mission, 283 F. 2d 817 (C.A. 9), certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 365 U.S. 879, and *California Co.* v. *United Gas Improvement Co.*, 365 U.S. 881. Indeed, "[t]his would tend to defeat the objective of providing simple, direct and effective stopgap protection for the consuming public." *United Gas Improvement Co.* v. *Federal Power Commission, supra*, 283 F. 2d at 823.

CONCLUSION

For these reasons, the petitions for writs of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1963.

No. 987.
No. 1026.

PRADO OIL AND GAS COMPANY,
Petitioner in No. 987,

SKELLY OIL COMPANY, et al.,
Petitioners in No. 1026,

v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY,
Respondents.

RESPONSE TO PETITIONS FOR A WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1963.

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No. 1026.

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Respondents.

RESPONSE TO PETITIONS FOR A WRIT OF CERTIORARI.

Respondents, The United Gas Improvement Company and Long Island Lighting Company, each gas distribution companies (herein referred to as "Distributor Respondents"), make the following Response to the Petition for a Writ of Certiorari filed by Prado Oil and Gas Company in No. 987 and to the Petition for a Writ of Certiorari filed by Skelly Oil Company, *et al.* in No. 1026.

COUNTER-STATEMENT OF QUESTION PRESENTED.

Whether the Federal Power Commission has the duty, when it ultimately issues permanent certificates of public convenience and necessity under Section 7 of the Natural Gas Act, to order refund of amounts collected by producers, under conditional temporary certificates issued to them *ex parte*, above the price level found to be required by the public convenience and necessity.

COUNTER-STATEMENT OF THE CASE.

For their Counter-Statement of the Case, Distributor Respondents rely upon and call this Court's attention to the statement in the opinion of the Court of Appeals below (Skelly Pet. 11a-13a).

ARGUMENT.

The decision of the Court of Appeals for the District of Columbia Circuit below dealt with two major issues. The first issue, that of the proper initial price for the interstate sales of gas by producer-applicants, was before the Court of Appeals in Docket Number 17859, *inter alia*, on appeal by Prado Oil and Gas Company from the Federal Power Commission's finding that a 15¢ per Mcf price was required by the public convenience and necessity for sales from Texas Railroad Commission District No. 4 during the period involved. The second issue was raised by the appeals of the Public Service Commission of the State of New York in Number 17582 and Distributor Respondents in Number 17628 from the Commission's refusal to order refund of windfall excesses collected by producers under *ex parte* temporary authority above the lawful 15¢ initial price.

Distributor Respondents were not intervenors in Number 17859 before the Court of Appeals below. However, being named Respondents by Petitioner Prado Oil and Gas Company in its Petition for a Writ of Certiorari, Distributor Respondents make the following brief response. The Petition for a Writ of Certiorari to review the decision of the Court of Appeals for the District of Columbia Circuit in Number 17859 on the initial price issue should be denied. The clear reasons for denying said Writ are set forth in the Responses filed with this Court by the Federal Power Commission, Respondent below in Number 17859, and the Public Service Commission of the State of New York, an intervenor below in that case, and need not be duplicated here.

On the refund issue, the position of Distributor Respondents that the Natural Gas Act does not permit the device of temporary authorization to become the source of windfall rate collections by producers, was vindicated by the decision of the Court of Appeals below which held that

the Federal Power Commission has the power to prevent such windfalls.

The Federal Power Commission, in its decision reviewed below, had not denied its power to condition the issuance of permanent certificates on the giving up of windfall excesses collected under temporary authority. Rather, assuming the power, it nonetheless entered a "directed verdict" for the producers, allowing them to retain excess amounts collected above rates found to be required by the public convenience and necessity from the initiation of service in interstate commerce. The Court of Appeals reversed this "directed verdict" and remanded to the Commission for further proceedings. Such proceedings, within the scope of the Court's mandate, could involve either a "directed verdict" in favor of consumer interests, or a "new trial," if further factual evidence appeared to be required as a basis for Commission decision.

Respondents were satisfied with this vindication of their position by the Court of Appeals and confident that the action of the Commission on remand could only be a "directed verdict" ordering complete refund of windfall excesses collected by producers. Such a result is dictated by facts that appear from the petitions of producers themselves to this Court, which show:

(1) The producer-petitioners sought the temporary authorizations here at issue solely to avoid alleged individual economic hardship, not because of any consumer or general public need (Skelly Pet. 4, 21-22).

(2) In addition to the temporary certificates here in litigation, the Commission has issued many thousands of temporary certificates (Skelly Pet. 22). Under the theory advocated by Petitioners the existence of the certificates would mean circumvention of Section 7 of the Natural Gas Act for protracted periods and enormous windfalls to pro-

ducers at the expense of consumers. See *Atlantic Rfg. Co. v. Public Service Comm'n*, 360 U. S. 678 (1959) (*CATCO*).

(3) The absence of careful administrative scrutiny given to initial price or any other issue by the Commission in issuing temporary certificates is dramatized in the present case by its issuance to Skelly Oil Company of a temporary certificate which Skelly never even requested (Skelly Pet. 4, n. 3). Such summary administrative haste could be valid only if subsequent Commission action offers a complete bond of protection for consumers through refunds. *Atlantic Rfg. Co. v. Public Service Comm'n, supra.*

(4) Temporary certificates in the present proceedings were sought and obtained as early as November 12, 1959; while hearings on the applications for permanent certificates did not begin until March 10, 1960 (Skelly Pet. 4-5), and a final decision did not issue until August 30, 1962 (Skelly Pet. 7). Absent refunds, the producer petitioners here will, in effect, have received a permanent certificate to sell gas in interstate commerce for a period up to two and a half years at an illegally high price—an "attractive gap" in regulation which must be eliminated. *Transcontinental Gas Pipe Line Co. v. FPC*, 365 U. S. 1 (1961).

(5) As justification for retention of substantial windfall amounts the Petitioners cite only three factors suggesting possible injury: inability to recoup (a) Federal income tax, (b) state production tax, (c) royalties paid upon the excesses collected (Skelly Pet. 25; Prado Pet. 9). But footnote 14 on page 4 of Prado's Petition indicates that state production taxes are the only actual expenditure made from these windfall excesses which producers might be unable to recoup when required to refund the excesses. At most these amount to only seven per cent of the windfalls in question here, TEXAS REV. CIV. STAT. tit. 122A, art. 3.01(1). An

order could be framed; without need for further burdening of the record, requiring refund of all excess moneys collected by producers which they were not as a matter of law required to disburse and could not legally recoup by means of adjustments over the life of these long-term sales contracts.

Distributor Respondents contend that based on the above facts and other facts of record the remand to the Commission ordered below could only result in a "directed verdict" ordering refund of windfall excesses. For this reason they saw no need to burden this Court with an appeal from the failure of the Court of Appeals to anticipate by ordering such a "directed verdict." Moreover, since the entire refund issue was remanded to the Commission for further proceedings, it was not clear that review of the order below by this Court was appropriate at this time. However, if the producers are successful in urging the granting of their Petitions for a Writ of Certiorari to review the court below on the refund issue, then Distributor Respondents would support the judgment below * on the ground that as a matter of law the Commission has a duty under the Natural Gas Act to order refunds in the present circumstance. Since the law is clear as to this issue, the only function to be served by a "new trial" would be further delay—a result which clearly should be avoided. *FPC v. Hunt Oil Co.*, — U. S. —, 11 L. Ed. 2d 878 (1964).

CONCLUSION.

For the above reasons Distributor Respondents respectfully urge that the Petition of Prado Oil and Gas Company in No. 987 to review the decision of the Court of Appeals on the initial price issue (No. 17859 below) be

* Such a defense on appeal is familiar to appellate procedure. See, *e.g.*, *Kunz v. Titusville*, 373 Pa. 528 (1953).

denied. Distributor Respondents' position on the grant of the Petition of Prado Oil and Gas Company in No. 987 and the Petition of Skelly Oil Company, *et al.* in No. 1026 on the refund issue is as set forth in the paragraph above. (p. 6)

Respectfully submitted,

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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

SKELLY OIL COMPANY, CONTINENTAL OIL COMPANY, SUNRAY DX OIL COMPANY, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, ET AL., *Respondents.*

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v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, ET AL., *Respondents.*

REPLY MEMORANDUM OF PETITIONERS

Petitioners, Skelly Oil Company, *et al.*, file this reply to the pleading submitted herein on May 22, 1964, denominated "Brief for Public Service Commission of the State of New York".

The court below held that the Commission has the power to order reparations of amounts collected pursuant to unconditional temporary certificates and remanded the proceedings for "further development and fuller consideration of equitable factors" involved.[1] The petition in No. 1026 is limited to the question of whether the Commission has the *power* to order reparations of amounts collected pursuant to unconditional temporary certificates.

[1] See, Petition No. 1026, p. 25a.

Although the Public Service Commission of the State of New York (New York Commission) apparently does not oppose the granting of *certiorari* for consideration of this limited issue, it attempts to add an entirely new issue not contemplated in No. 1026 (P.S.C. Br. 15). Thus, New York Commission advocates that the Commission *must* order reparations, a position which it urged in the court below but which that court rejected when it remanded for further proceedings (Pet. No. 1026, p. 25a). Quite obviously, New York Commission does not support the decision below which remanded for a determination of "equitable considerations", but seeks reversal of the decision because the lower court held that the Commission may refuse to order reparations, if it finds it equitable to do so.

Plainly, New York Commission would misuse the procedures of this Court. For, as a respondent, it may not, through its brief in opposition to the petition in No. 1026, seek to overturn the decision below on grounds not presented in the petition. New York Commission's attempt to inject into No. 1026 a contention that the decision below should be reversed, because of the Court's refusal to hold that reparations must be ordered, violates the "inveterate and certain" rule that a party may not, in the absence of a cross petition, "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary. . . ." *United States* v. *American Railway Express Co.*, 265 U.S. 425, 435 (1924); *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 191 (1937)[2]

[2] See also, Stern & Gressman, Supreme Court Practice, pp. 261-262, 264, §§ 6-49 and 6-50 (3rd ed. 1962).

This Court has long insisted that "A respondent or an appellee may urge any matter appearing in the record *in support of a judgment*, but he may not attack it *even on grounds asserted in the court below*, in an effort to have this Court reverse it, when he himself has not sought review of the whole judgment, or of that portion which is adverse to him" (Emphasis added, footnotes citing numerous precedents omitted). *Le Tulle v. Scofield*, 308 U.S. 415, 421-422 (1940).[3] Yet New York Commission asks this Court to reverse the decision below when it attacks that decision because of the lower court's refusal to hold that reparations must be ordered.

It should be noted that this "inveterate and certain" rule has firm basis in fairness to the parties and assists the Court through a more complete and orderly presentation of arguments. Conversely, because cases arising on petitions for writs of *certiorari* are referred to the Court promptly after submittal of opposing briefs, it is obvious that New York Commission's attempted to circumvent filing of its own petition would effectively deny to Petitioners opportunity to file a brief in opposition and would leave this Court with an inadequate presentation of arguments.

Obviously, New York Commission's "brief" fails to comply with the Rules of this Court relating to petitions for *certiorari*. Accordingly, Petitioners in No. 1026 urge that

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[3] New York Commission's request that the Federal Power Commission be redesignated as an intervenor-petitioner (P.S.C. Br. p. 15) emphasizes the true nature of its position in opposition to the decision below. Of course, New York Commission cannot by such a stratagem escape the fact that it, not the Federal Power Commission, is a would-be petitioner.

(1) the Court deny New York Commission's request that the issues herein be broadened; and

(2) the Court specify that it will consider only the issue raised in the Petition in No. 1026, namely, the power of the Commission to order reparations of amounts collected pursuant to unconditional temporary certificates.

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PRADO OIL AND GAS COMPANY,

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PUBLIC SERVICE COMMISSION OF
THE STATE OF NEW YORK,
UNITED GAS IMPROVEMENT COMPANY,
LONG ISLAND LIGHTING COMPANY,

Respondents.

MEMORANDUM REPLY TO BRIEFS FILED BY RESPONDENTS

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LONG ISLAND LIGHTING COMPANY,

Respondents.

MEMORANDUM REPLY TO BRIEFS FILED BY RESPONDENTS

Petitioner, PRADO OIL AND GAS COMPANY, submits the following memorandum reply to the briefs filed by the Federal Power Commission, the Public Service Commission of the State of New York and Long Island Lighting Company et al.[1]

[1] These briefs are permeated with arguments and assertions more appropriately discussed in briefs on the merits. Petitioner's silence with respect to these matters does not indicate acquiescense.

1.

Subsequent to the filing of the Petition for Certiorari in this case, the Fifth Circuit has recognized the conflict between the decision of the court below and the decision of the Tenth Circuit in *Sunray Mid-Continent Oil Co.* v. *FPC*, 270 F. 2d 404. On May 28, 1964, the Fifth Circuit issued its decision in *Hunt Oil Co. et al* v. *FPC* (Nos. 19,218 et al[2]), holding, *inter alia*, that the Federal Power Commission had authority to issue temporary certificates subject to a condition requiring the producers to refund any amounts collected in excess of the amount determined to be required by the public convenience and necessity in the final permanent certificate order. In agreeing with the holding of the court below, Judge Skelly Wright,[3] speaking for the Fifth Circuit, stated:

> "With reference to the refund condition, the United States Court of Appeals for the District of Columbia Circuit, in an opinion by Judge Fahy, has approved this refund condition on a temporary authority. *Public Service Com'n of State of N.Y.* v. *Federal Power Com'n*, D.C. Cir., 329 F. 2d 242 (1964). It is true that the Tenth Circuit, in *Sunray Mid-Continent Oil Co.* v. *Federal Power Com'n*, 10 Cir., 270 F. 2d 404 (1959), apparently has held to the contrary.[4] In addition to the rejection of *Sunray* by the District of Columbia court, however, this court, in *Texaco, Inc.* v. *Federal Power Commission*, 5 Cir., 290 F. 2d 149, 156-157 (1961), has expressly reserved opinion as to 'whether the powers of the Commission respect-

[2] This decision is not yet reported. Because of the shortness of time, Petitioner was unable to have it printed as an appendix to this Reply Brief. In this connection, Petitioner was informed by the Clerk's office that this Reply had to be filed by June 3 in order to be considered by the Court.

[3] Sitting by designation.

ing the imposition of such a condition in the grant of a temporary certificate are as circumscribed as determined by the Court of Appeals for the Tenth Circuit."

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[*] "Actually, *Sunray* is factually not in point. There, unlike here, the producer had not yet dedicated its gas to the interstate market. Where operation had commenced under a temporary authorization, the Tenth Circuit in the same case dismissed a petition to review its conditions. 270 F. 2d at 407."

2.

The primary question presented to the Court concerns the authority of the Federal Power Commission under Section 7(c) of the Natural Gas Act to require producers to refunds amounts previously collected pursuant to unconditional temporary certificates. The Commission recognizes the importance of this question and states that "The decision below appears to be inconsistent with the reasoning of the Tenth Circuit in *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 270 F. 2d 404, 407-410" (Br., p. 9). However, the Commission argues that review is premature at the present stage of the proceedings, contending that after hearings on remand it may conclude that refunds are inappropriate,[1] or that if refunds are ordered Petitioner will still be in a position to challenge the Commission's power by a subsequent appeal (Br., pp. 10-11).

Petitioner submits that the Commision's recommended procrastination is inconsistent with sound judicial administration. The question of the Commision's power to award refunds is of vital importance to the entire natural gas industry. If Petitioner prevails, then the expense, time

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[1] New York and Long Island et al evidently do not agree with the Commission since they argue that the practical effect of the decision below is that refunds are mandatory.

and effort incident to further proceedings ordered by the court below will be avoided. The same is true as to cases now pending before the Commission involving the same issue. See Opinion No. 422, *Amerada Petroleum Corporation, et al*, Docket Nos. CI62-1544, *et al*, where the Commission is considering the refund question with respect to 35 consolidated certificate applications.[5] Further, it is imperative that the Court remove the existing uncertainty[6] as to the status of amounts now being collected by other producers pursuant to unconditional temporary certificates and provide guidance to those who are contemplating commitment of their gas to the interstate market under temporary certificates. Deferral of a decision in this case will only delay and not resolve the admittedly important question of the Commission's power to award refunds.

3.

New York concludes that certiorari on the refund issue is "both appropriate and desirable" (Br., p. 14). However, contrary to Rule 23(1)(c) New York attempts to smuggle into the case an entirely new question concerning the *duty* of the Commission to award refunds. The court below decided that the Commission had the *power* to award refunds but expressly held, contrary to New York's assertion,

[5] More recently the Commission has commenced proceedings in *H. L. Hawkins & H. L. Hawkins, Jr. Operator, et al* Docket Nos. G-18077 et al (40 consolidated producer applications), *Sinclair Oil & Gas Company et al*, Docket Nos. G-16760 et al (49 consolidated producer applications) and *Turnbull & Zoch Drilling Co. (Operator), et al*, Docket Nos. G-17960, et al, (69 consolidated producer applications) which involve the power of the Commission to require producers to refund amounts previously collected pursuant to temporary certificates.

[6] This uncertainty is reflected in the orders under review where the Commission originally held that there was no basis for ordering refunds. However, on rehearing the Commission reached the same result but on the ground that it would be inequitable to order refunds.

that the exercise of this power is not mandatory 329 F. 2d at 250 Petitioner seeks review of the decision as to the Commission's power to award refunds. New York did not seek certiorari, but now attempts to expand the question presented to include its rejected argument that the Commission has the *duty* to award refunds. This is nothing more than a belated attempt by New York to seek certiorari, and accordingly should be denied. Likewise, its request that the Commission is designated an intervenor-petitioner should be denied.[7]

4.

In the landmark *CATCO*[8] case this Court had its *only* opportunity to consider evidence (or lack thereof) presented by producers in a certificate proceeding to support their initial contract prices. Now approximately five years later the producers, Commission, and consumer representatives are still in substantial disagreement as to what the Court intended in *CATCO* insofar as the quality and quantity of evidence to be considered in determining whether a proposed initial contract price is consistent with the public convenience and necessity. The instant appeal aptly illustrates the divergent interpretations of *CATCO* on this point.

Prado submits that *CATCO* clearly indicates that evidence other than what others are receiving for their gas in the area, if available and relevant, should be introduced and considered (Pet. pp. 10-12). Both the Commission and

[7] New York errs in its contention that the Commission has been aligned with Petitioner on the refund issue. (Br. p. 7). It is Petitioner's position that the Commission is without statutory power to award refunds, while the Commission claims that it has the discretionary power to award or deny refunds. Clearly, the Commission's position is adverse to Petitioner's.

[8] *Atlantic Ref. Co.* v. *Public Serv. Com'n.*, 360 U.S. 378 (1959).

New York construe *CATCO* to mean that cost and financial evidence should not be considered but the rationale each follows to reach this desired result is contradictory. The Commission would isolate and confine *CATCO* so that it would mean that evidence of relative production costs, etc., is appropriate only when considering a new production area from which a "line" could not be established because no other sales have been made (Br. p. 14). On the other hand, New York argues that in *CATCO* the Court "searched the record for supporting cost data" because the Commission "had unconditionally certificated an out-of-line price" (Br. p. 8). The inconsistency with the Commission's interpretation of *CATCO* is readily apparent. How could the *CATCO* price be "out-of-line" if, as the Commission states, the sales were from "an area in which no price line had yet been established"? These inconsistent interpretations of *CATCO* simply reinforce Petitioner's plea for clarification of the evidentiary standards to be used in Section 7 certificate cases.

CONCLUSION

The briefs filed by the Commission, New York and Long Island Lighting, et al confirm the need for review by this Court of the decision below and the underlying orders of the Commission. Accordingly, certiorari should be granted.

Respectfully submitted.

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